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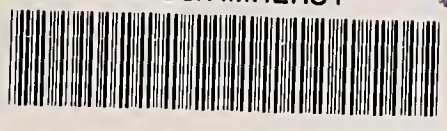
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# OMBUDSMAN

FOR MASSACHUSETTS



COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE  
OFFICE OF PLANNING AND PROGRAM COORDINATION

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ALFRED C. HOLLAND, STATE PURCHASING AGENT

AN OMBUDSMAN  
FOR MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS  
GOVERNOR FRANCIS SARGENT

EXECUTIVE OFFICE FOR  
ADMINISTRATION AND FINANCE  
COMMISSIONER DONALD DWIGHT

OFFICE OF PLANNING AND PROGRAM COORDINATION  
ROBERT H. MARDEN, DIRECTOR



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HOUSING AND URBAN DEVELOPMENT,  
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URBAN AFFAIRS

JAMES VAN DE WATER	PROJECT DIRECTOR
MICHAEL SHARPLES	SENIOR RESEARCH ANALYST
DONALD HOPKINS	URBAN AFFAIRS CONSULTANT
NORMA HARVEY	ADMINISTRATIVE ASSISTANT
WAYNE TYREE	RESEARCH ANALYST - HOUSING
JUDITH WEINBERG	RESEARCH ASSISTANT - ECONOMIC DEVELOPMENT
MARGERY BROOMELL	SENIOR RESEARCH ASSISTANT
JOAN MCCARTHY	LIAISON - NEW ENGLAND REGIONAL COMMISSION
ELLEN TELES	RESEARCH ASSISTANT - URBAN AFFAIRS







ROBERT H. MARDEN  
DIRECTOR

*The Commonwealth of Massachusetts*  
*Executive Office for Administration and Finance*  
*Office of Planning and Program Coordination*

*State Office Building, Room 909*  
*100 Cambridge Street,*

*Boston 02202*

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DR. ROBERT H. MARDEN  
DIRECTOR  
OFFICE OF PLANNING AND  
PROGRAM COORDINATION  
100 CAMBRIDGE STREET Room 909  
BOSTON, MASSACHUSETTS 02202

DEAR DR. MARDEN:

THIS REPORT, ANALYZING THE DESIRABILITY OF ESTABLISHING AN OFFICE OF OMBUDSMAN FOR MASSACHUSETTS, IS SUBMITTED TO YOU AS A PRODUCT RESULTING FROM THE JOINT FUNDING OF THE OFFICE OF PLANNING AND PROGRAM COORDINATION BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THE NEW ENGLAND REGIONAL COMMISSION AND THE COMMONWEALTH OF MASSACHUSETTS. THE STUDY WAS UNDERTAKEN AT THE REQUEST OF MR. ROBERT CASSELMAN, CHAIRMAN OF THE MODERNIZATION TASK FORCE. IT IS DESIGNED TO EXPLORE THE FEASIBILITY OF CREATING AN OMBUDSMAN IN LIGHT OF THE RELATIONSHIP THAT INSTITUTION WOULD HAVE TO BOTH THE EXISTING AND THE PROPOSED STRUCTURE OF STATE GOVERNMENT.

THOUGH THE WORK PRODUCT IS ENTIRELY MY OWN RESPONSIBILITY, I AM DEEPLY INDEBTED TO THE MEMBERS OF THE STAFF OF THE OFFICE OF PLANNING AND PROGRAM COORDINATION FOR THE COMMENTS AND COUNSEL THAT PROVED SO HELPFUL IN ITS PREPARATION. I AM ALSO INDEBTED TO THE STAFF OF THE INTERGOVERNMENTAL AFFAIRS SECTION FOR THEIR ASSISTANCE AND ENCOURAGEMENT ESPECIALLY TO MISS ELLEN TELES. FINALLY I WISH TO THANK THOSE INDIVIDUALS AT HARVARD LAW SCHOOL WHO WERE ABLE TO READ AND COMMENT ON THE DRAFT OF THIS REPORT.

SINCERELY YOURS,

*James Van de Water*

JAMES VAN DE WATER



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## INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

THE OMBUDSMAN IS A NEW AGENCY FOR THE RECEIPT AND INVESTIGATION OF COMPLAINTS BY THE PUBLIC AGAINST ADMINISTRATIVE ACTIONS. IT IS ONE OF THE MOST TALKED-ABOUT INSTITUTIONAL REFORMS OF GOVERNMENT IN RECENT TIMES. THE ESTABLISHMENT OF THIS OFFICE HAS BEEN ADVOCATED AT THE FEDERAL, STATE AND LOCAL LEVEL OF GOVERNMENT IN EVERY REGION OF THE COUNTRY. IT HAS BEEN PROPOSED AS THE SOLUTION TO SUCH A WIDE RANGE OF PROBLEMS THAT IF IT MET THE CUMULATIVE PROMISES OF ITS ADVOCATES, IT WOULD BE A CURE ALL FOR TWENTIETH CENTURY GOVERNMENT, RIGHTING ALL WRONGS AND CORRECTING ALL ABUSES.

WHAT IS FACT AND WHAT IS FICTION? WHAT IS THE OMBUDSMAN AND HOW WILL ITS ESTABLISHMENT AID THE EFFECTIVE FUNCTIONING OF GOVERNMENT?

THIS REPORT BEGINS WITH AN EXAMINATION OF THE SCANDANAVIAN ORIGINS OF THE INSTITUTION. ONE HUNDRED AND FIFTY YEARS PASSED FROM THE BIRTH OF THE INSTITUTION IN SWEDEN TO THE TIME WHEN IT WAS FOUND IN ALL OF SCANDANAVIA. IN RECENT YEARS THE OMBUDSMAN CONCEPT HAS SPREAD TO NON-SCANDANAVIAN NATIONS INCLUDING NEW ZEALAND AND CANADA WHERE IT HAS WON POPULAR ACCLAIM. OTHER COUNTRIES, NOTABLY RUSSIA AND YUGOSLOVIA HAVE ALSO EXPERIENCED A RENEWED INTEREST IN ADMINISTRATIVE CONTROL DEVICES. THE FIRST SECTION OF THE REPORT CLOSES WITH A HISTORY OF THE OMBUDSMAN PROPOSALS IN THE UNITED STATES. THESE PROPOSALS HAVE

BEEN MADE AT THE FEDERAL, STATE AND LOCAL LEVEL AND THE COMMONWEALTH OF MASSACHUSETTS HAS A LONG HISTORY OF INTEREST IN THE INSTITUTION.

SECTION II OF THE STUDY EXPLORES THE QUESTION OF THE RELATION OF THE OMBUDSMAN TO THE STRUCTURE OF AMERICAN GOVERNMENT. HERE THE INTERACTION OF THE OMBUDSMAN WITH THE STATE AUDITOR AND OTHER ADMINISTRATIVE CONTROL MECHANISMS, BOTH FORMAL AND INFORMAL, PUBLIC AND PRIVATE IS REVIEWED. WE SEE THAT THIS OFFICE WOULD NOT BE IN CONFLICT WITH ANY EXISTING PUBLIC OR PRIVATE INSTITUTION BUT RATHER WOULD SERVE TO COMPLIMENT AND SUPPLEMENT THE ACTIVITIES OF THESE AGENCIES. ONCE AGAIN THE REPORT PAYS PARTICULAR ATTENTION TO MASSACHUSETTS. THE STUDY EXAMINES THE OMBUDSMAN AS IT RELATES TO THE NEWLY PROPOSED STRUCTURE OF STATE GOVERNMENT. IT WAS AGAIN FOUND THAT THE PROPOSED STRUCTURE WAS COMPATIBLE WITH THE OMBUDSMAN.

THE OMBUDSMAN HAS A ROLE TO PLAY IN REGULATING GOVERNMENT PRACTICES AND PROCEDURES. IT MUST BE RECOGNIZED, HOWEVER, THAT NO SINGLE CONTROL DEVICE CAN BE TOTALLY RESPONSIBLE FOR INSURING THE EFFICACIOUS AND EQUITABLE FUNCTIONING OF THE ADMINISTRATIVE PROCESS. AS AN INDEPENDENT ADMINISTRATIVE CONTROL MECHANISM OF THE LEGISLATURE, THE OMBUDSMAN WOULD BE ABLE TO INVESTIGATE INDIVIDUAL CITIZEN'S COMPLAINTS AND DETECT PATTERNS OF ADMINISTRATIVE ABUSE. IT WOULD IMPROVE THE MORALE OF STATE GOVERNMENT WORKERS BY PROTECTING THEM AGAINST UNWARRANTED COMPLAINTS. IT WOULD HELP CITIZENS TO RELATE TO AN INCREASINGLY COMPLEX AND BEWILDERING STRUCTURE OF GOVERNMENT.



FOR THESE REASONS THE STUDY RECOMMENDS THE ESTABLISHMENT OF AN OMBUDSMAN IN MASSACHUSETTS. THE CREATION OF THIS OFFICE IS NOT A NECESSARY PART OF MODERNIZING STATE GOVERNMENT, BUT WOULD BE A DESIRABLE ADJUNCT TO IT.

AN AGENCY WITH POWER TO INVESTIGATE COMPLAINTS BUT WITHOUT POWER TO REVERSE ANY ADMINISTRATIVE ACTION IS PROPOSED. IT WOULD HAVE THE AUTHORITY TO INVESTIGATE EVERY STATE AGENCY WITH THE EXCEPTION OF THE STATE POLICE. IT WOULD NOT HAVE JURISDICTION OVER THE ACTIONS OF FEDERAL OR MULTI-STATE ENTITIES AND LOCAL GOVERNMENT AGENCIES. IN ADDITION, CERTAIN ELECTED STATE OFFICERS, THE LEGISLATURE AND THE JUDICIARY ARE EXEMPTED FROM COVERAGE SINCE IT IS BELIEVED THAT PRESENT POLITICAL CONTROL OF THESE AGENCIES AND PERSONS IS ADEQUATE. DESPITE THESE LIMITATIONS, THE OMBUDSMAN WILL HAVE JURISDICTION TO DEAL WITH NUMEROUS STATE AGENCIES INCLUDING THE DEPARTMENT OF PUBLIC WELFARE, THE YOUTH SERVICE BOARD, THE DEPARTMENT OF CORRECTION, THE DEPARTMENT OF PUBLIC WORKS AND THE DEPARTMENT OF MENTAL HEALTH TO NAME BUT A FEW AGENCIES.

THE OMBUDSMAN, NOMINATED BY A COMMITTEE SELECTED BY THE GOVERNOR, WOULD BE APPOINTED BY A MAJORITY VOTE OF EACH HOUSE OF THE GENERAL COURT FOR A TERM OF SIX YEARS. HE WOULD BE GIVEN FREEDOM TO SELECT HIS STAFF, ORGANIZE HIS OFFICE AND PRESCRIBE THE METHODS BY WHICH COMPLAINTS ARE TO BE MADE. HE WOULD BE GIVEN AUTHORITY TO INVESTIGATE A VARIETY OF ADMINISTRATIVE ACTIONS AND THE POWER TO SUBPOENA WITNESSES AND PAPERS OR HOLD HEARINGS NEEDED FOR SUCH INVESTIGATIONS. THE OMBUDSMAN WOULD BE ALLOWED TO COMMUNICATE THE RESULT OF ANY INVESTIGATION TO THE PUBLIC AND MAKE REPORTS TO THE GOVERNOR AND THE GENERAL

COURT. HE WOULD BE REQUIRED TO CONSULT WITH THE STATE AGENCY INVOLVED PRIOR TO MAKING SUCH REPORTS, HOWEVER, AND WOULD NOT BE ALLOWED TO NAME ANY INDIVIDUAL WHO HAS CIVIL SERVICE STATUS IN ANY REPORT HE MAKES. THESE PROVISIONS ARE ALL FOUND IN A SUGGESTED STATUTE AT THE CONCLUSION OF THIS STUDY.

## SECTION I

## A HISTORY AND BRIEF DESCRIPTION OF THE OMBUDSMAN CONCEPT

THE HISTORY OF THE OFFICE IS A FASCINATING STORY OF HUMAN INVENTIVENESS AND DIVERSITY. BEGINNING WITH SWEDEN, MANY COUNTRIES HAVE ADOPTED THE OMBUDSMAN SYSTEM. EACH HAS CHANGED THE CONCEPT TO FIT ITS OWN NATIONAL SURROUNDINGS AND GOVERNMENTAL PECULIARITIES. IN ADDITION, MANY OTHER COUNTRIES HAVE DEVELOPED ADMINISTRATIVE CONTROL DEVICES BEARING A REMARKABLE RESEMBLANCE TO THE ONE WE ARE DISCUSSING. SUBSECTION A DISCUSSES THOSE SYSTEMS (OTHER THAN AMERICAN) WHICH WERE A DIRECT OUTGROWTH OF THE SWEDISH INSTITUTION. SUBSECTION B DISCUSSES ADMINISTRATIVE CONTROLS IN OTHER SELECTED COUNTRIES. SUBSECTION C GIVES A SHORT DESCRIPTIVE HISTORY OF THE OMBUDSMAN IN THE UNITED STATES AND CANADA.

## SUBSECTION A: SCANDINAVIA

## (1) SWEDEN

THE CONCEPT OF THE OMBUDSMAN WAS FIRST DEVELOPED IN 1809 WITH THE ADOPTION OF A NEW SWEDISH CONSTITUTION. IT WAS THEN THAT THE LEGISLATURE, WISHING TO ASSERT ITS INDEPENDENCE, APPOINTED A "DEFENDER OF THE LAW" CALLED A JUSTITIEOMBUDSMAN (JO).<sup>1</sup> THIS OFFICE WAS DECLARED SEPARATE AND DISTINCT FROM THAT OF THE CHANCELLOR OF THE KING (JK),

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<sup>1</sup>DONALD ROWAT. "THE SPREAD OF THE OMBUDSMAN IDEA," IN STANLEY ANDERSON, OMBUDSMAN FOR AMERICAN GOVERNMENT (AMERICAN ASSEMBLY, 1968), P. 8.

WHICH HAD THE EXECUTIVE RESPONSIBILITY FOR CONTROLLING ADMINISTRATIVE BEHAVIOR. TODAY BOTH THE JO AND THE JK FUNCTION WITHIN SWEDISH GOVERNMENTAL STRUCTURE, BUT THE FORMER HAS BECOME THE MORE IMPORTANT OFFICE.<sup>2</sup>

ORIGINALLY THE JUSTITIEOMBUDSMAN WAS CONCERNED WITH SUPERVISING THE COURTS, BUT WITH THE GROWTH OF THE BUREAUCRACY IN THE TWENTIETH CENTURY A SHIFT IN EMPHASIS TO THE CONTROL OF GENERAL ADMINISTRATION HAS OCCURRED. IN 1915 A MILITARY OMBUDSMAN WAS APPOINTED TO EASE THE JO'S BURDEN OF DEALING WITH THE ENTIRE STRUCTURE OF GOVERNMENT.<sup>3</sup>

WHILE IT WOULD NOT BE PRODUCTIVE TO EXAMINE SWEDISH GOVERNMENTAL STRUCTURE AT THIS POINT, IT SHOULD BE NOTED THAT IT IS SUBSTANTIALLY DIFFERENT FROM ANY FOUND IN THE UNITED STATES. IT SHOULD ALSO BE NOTED THAT, ALTHOUGH IT IS BASICALLY PARLIAMENTARIAN, THE SPECIFIC ORGANIZATIONAL STRUCTURES ARE UNLIKE THE CONTINENTAL SYSTEMS WE ARE FAMILIAR WITH. WHAT IS INTERESTING AND PERTINENT IS THE FRACTIONATED STRUCTURE AND THE LACK OF LINES OF ADMINISTRATIVE RESPONSIBILITY TO PARLIAMENT.<sup>4</sup>

THE JO IS ELECTED BY FORTY-EIGHT MEMBERS OF PARLIAMENT, USUALLY WITHOUT REGARD TO POLITICAL CONSIDERATION, FOR A

<sup>2</sup>THE FIRST OMBUDSMAN OF THE KING (JK) ACTUALLY DATES ALL THE WAY BACK TO 1713, WHEN THE SWEDISH KING CHARLES XII APPOINTED A REPRESENTATIVE TO KEEP AN EYE ON THE ROYAL OFFICIALS. WALTER GELLHORN, OMBUDSMAN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (HARVARD UNIVERSITY PRESS, 1966), P. 194.

<sup>3</sup>ROWAT, P. 8.

<sup>4</sup>AN EXCELLENT DESCRIPTION OF THIS UNUSUAL GOVERNMENTAL STRUCTURE IS FOUND IN GELLHORN, PP. 195-202.

TERM OF FOUR YEARS. HE REPORTS ANNUALLY TO PARLIAMENT AND IS SUBJECT TO REMOVAL BY THAT BODY AND NOT BY THE EXECUTIVE. THE DEVICE TRADITIONALLY HAS NOT BEEN A VEHICLE FOR MAJOR ADMINISTRATIVE REFORMS. THIS IS DUE IN PART TO THE DELIBERATE SELECTION OF MEN TO FILL THE OFFICE WHO ARE NOT LIKELY TO ROCK THE BUREAUCRATIC BOAT.<sup>5</sup>

THE STRENGTH OF THE OMBUDSMAN LIES IN THE PRESTIGE OF THE OFFICE AND THE OFFICEHOLDER, AND NOT IN THE POWERS HE POSSESSES, WHICH ARE PRINCIPALLY ADVISORY IN NATURE. HIS POWER TO INVESTIGATE, EITHER ON HIS OWN INITIATIVE OR AFTER A COMPLAINT HAS BEEN RECEIVED, ALLOWS HIM TO EXPOSE ADMINISTRATIVE FAULT AND PRAISE ADMINISTRATIVE EXCELLENCE. IN SWEDEN HE MAY LOOK INTO COMPLAINTS WHICH ORIGINATE AT BOTH THE FEDERAL AND LOCAL LEVEL, ALTHOUGH THERE ARE RESTRICTIONS ON HIS INVESTIGATION OF CERTAIN HIGH ADMINISTRATIVE OFFICERS AND PARLIAMENT.<sup>6</sup>

## (2) FINLAND

FINLAND WAS A PART OF SWEDEN FOR SIX CENTURIES, UNTIL IT WAS CEDED TO RUSSIA IN 1809. WITH THIS LONG ASSOCIATION BETWEEN SWEDEN AND FINLAND IT IS NOT SURPRISING THAT FINLAND WAS ONE OF THE FIRST COUNTRIES OUTSIDE OF SWEDEN TO ADOPT THE OMBUDSMAN CONCEPT. AFTER MORE THAN A

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<sup>5</sup>THE OMBUDSMAN IS USUALLY DRAWN FROM THE JUDICIARY, WHERE PARTISAN POLITICAL ACTIVITY IN SWEDEN IS MINIMAL AT ANY RATE. GELLHORN, P. 204.

<sup>6</sup>WE WILL DISCUSS THE POWERS OF THE OFFICE IN DETAIL LATER IN THE STUDY, BUT IT SHOULD BE NOTED HERE THAT GELLHORN STRESSED THE FACT THAT THE ACTUAL ADMINISTRATIVE POWER HELD BY THE OFFICEHOLDER WAS NOT THE KEY TO THE SUCCESS OF THE SWEDISH OFFICE. GELLHORN, P. 205.

HUNDRED YEARS OF CZARIST RULE, THE CONSTITUTION OF 1919 CREATED AN OFFICE OF THE OMBUDSMAN APPOINTED BY THE LEGISLATURE SIMILAR TO THAT FOUND IN SWEDEN.<sup>7</sup> HOWEVER, THE LONG YEARS OF RUSSIAN DOMINATION HAD SEEN THE DEVELOPMENT OF THE CHANCELLORS OF JUSTICE AS THE PRINCIPAL BULWARK OF INDIVIDUAL LIBERTY. TODAY THERE ARE TWO OFFICES WHICH DEAL EQUALLY WITH COMPLAINTS AGAINST THE GOVERNMENT, ONE APPOINTED BY THE EXECUTIVE AND ONE APPOINTED BY THE LEGISLATURE. UNLIKE SWEDEN, THE CHANCELLOR IS THE MORE IMPORTANT OFFICIAL AND GENERALLY HANDLES THE MORE SERIOUS CASES. THERE IS ANOTHER IMPORTANT DIFFERENCE BETWEEN SWEDEN AND FINLAND: THE FINNISH OMBUDSMAN HAS POWER TO PROSECUTE THE HIGHEST JUDGES AND OFFICIALS AND HAS EXERCISED THAT OPTION OFTEN IN THE PAST.

### (3) DENMARK AND NORWAY

FOR MANY YEARS SWEDEN AND FINLAND WERE ALONE IN THE ESTABLISHMENT OF THE OFFICE. IT WAS NOT UNTIL 1952 THAT NORWAY SET UP A MILITARY OMBUDSMAN.<sup>8</sup> IN 1953 DENMARK PROVIDED FOR AN OMBUDSMAN IN ITS NEW CONSTITUTION, AND IN 1955 PROFESSOR STEPHAN HURWITZ WAS APPOINTED THE FIRST DANISH OMBUDSMAN. IT WAS AT LEAST PARTIALLY THROUGH THE EFFORTS OF THIS MAN THAT THE INSTITUTION SPREAD TO OTHER WESTERN NATIONS. HIS WRITINGS IN ENGLISH AND HIS SPEAKING TOURS

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<sup>7</sup>GELLHORN, P. 49.

<sup>8</sup>GELLHORN, P. 57.

ENCOURAGED OTHER COUNTRIES TO IMPLEMENT THEIR OWN PROGRAMS.<sup>9</sup>

THE DANISH OMBUDSMAN WAS ORIGINALLY RESTRICTED TO THE STRONG CENTRAL GOVERNMENT OF THE COUNTRY AND WAS UNABLE TO DEAL WITH THE OVER 1,400 LOCAL GOVERNMENT UNITS.<sup>10</sup> IN 1962 HIS JURISDICTION WAS EXTENDED TO LOCAL GOVERNMENTS IN CERTAIN CIRCUMSTANCES, BUT EARLIER RESTRICTIONS ON HIS ABILITY TO WORK WITH THE COURTS WERE RETAINED. THIS GENERAL RESTRICTION AS TO THE SUPERVISION OF THE JUDICIARY IS A MAJOR DEPARTURE FROM THE DANISH OFFICE'S SWEDISH COUNTERPART.<sup>11</sup>

LIKE THE SWEDES, BUT UNLIKE THE FINNS, THE DANISH OMBUDSMAN RARELY USES HIS POWER TO INITIATE PROSECUTION OF ERRANT OFFICIALS. PRIMARY RELIANCE IS PLACED ON THE OFFICE'S POWER OF PERSUASION AND THE VOLUNTARY COMPLIANCE OF OFFICIALS. THE POWER TO PROSECUTE FOR UNLAWFUL ACTIONS, HOWEVER, WHETHER USED OR UNUSED, MUST OFTEN "ENCOURAGE" OFFICIAL COOPERATION.<sup>12</sup>

NORWAY, THOUGH IT HAD A MILITARY OMBUDSMAN SINCE 1952, WAS THE LAST SCANDINAVIAN COUNTRY TO ADOPT THE INSTITUTION. IN 1958 AN EXPERT COMMISSION ON ADMINISTRATIVE PROCEDURE GAVE THE OMBUDSMAN CONCEPT ITS WHOLEHEARTED ENDORSEMENT, AND IN 1963 THE OFFICE WAS ESTABLISHED.<sup>13</sup> DURING THE FIRST YEAR

<sup>9</sup>ROWAT, PP. 14-15.

<sup>10</sup>ADMINISTRATION IN DENMARK IS FURTHER COMPLICATED BY THE FACT THAT THE POPULATION OF THE NATION IS SPREAD OVER 100 OF DENMARK'S 500 ISLANDS. GELLHORN, P. 9.

<sup>11</sup>GELLHORN, P. 12.

<sup>12</sup>WE SHOULD NOTE HERE THAT THE DANISH OMBUDSMAN HAS BEEN CRITICIZED FOR ATTEMPTING TO EXERCISE JURISDICTION OVER TOO WIDE A VARIETY OF GOVERNMENTAL ACTIVITIES. GELLHORN, PP. 42-43.

<sup>13</sup>GELLHORN, PP. 154-158.

THAT THE OFFICE WAS IN BUSINESS, IT REGISTERED 1,257 CASES. THE LAST SCANDINAVIAN COUNTRY TO ADOPT THE INSTITUTION HANDLED MORE COMPLAINTS THAN EITHER FINLAND, DENMARK OR SWEDEN IN THE SAME YEAR.<sup>14</sup>

THE NEW NORWEGIAN OFFICE MAY NOT DEAL WITH CASES BEING CONSIDERED BY PARLIAMENT, MINISTERIAL DECISIONS, THE COURTS OF THE AUDITOR OF PUBLIC ACCOUNTS. THIS OFFICE ALSO IS NOT SUPPOSED TO CONSIDER MATTERS OF PURELY LOCAL CONCERN (EXCEPT IN CERTAIN RARE CASES NOT PERTINENT TO OUR DISCUSSION). LOCAL GOVERNMENTS IN NORWAY, HOWEVER, HAVE AN EXTREMELY LIMITED JURISDICTION, AND THEIR RESTRICTION DOES NOT GREATLY REDUCE THE SCOPE OF THE OMBUDSMAN'S ACTIVITY.<sup>15</sup>

#### (4) NEW ZEALAND AND THE UNITED KINGDOM

IN 1962 THE OMBUDSMAN FACED A SEVERE TEST OF ITS INSTITUTIONAL STRENGTH. FOR THE FIRST TIME THE OFFICE WAS ESTABLISHED OUTSIDE OF SCANDINAVIA, HALFWAY AROUND THE WORLD IN THE SMALL COMMONWEALTH COUNTRY OF NEW ZEALAND. MANY PEOPLE HAD DOUBTED THE ADAPTABILITY OF THE INSTITUTION BEYOND THE AREA OF ITS BIRTH. WOULD THIS NEW SYSTEM, OPERATING WITHIN A DIFFERENT GOVERNMENTAL STRUCTURE, ACTING IN A WHOLLY DIFFERENT CULTURAL SETTING, EXPERIENCE THE SAME DEGREE OF SUCCESS AS IT HAD IN ITS NATIVE ENVIRONMENT?<sup>16</sup>

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<sup>14</sup>GELLHORN, P. 157.

<sup>15</sup>THE PROBLEM OF DETERMINING THE DIFFERENCE BETWEEN MATTERS OF "PURELY LOCAL CONCERN" AND THOSE OF NATIONAL INTEREST MUST BE EXTREMELY DIFFICULT AT BEST, AND THE RESTRICTION APPEARS TO BE IGNORED IN MOST CASES. GELLHORN, PP. 165-167.

<sup>16</sup>GELLHORN, P. 91.



NEW ZEALAND'S EXPERIENCE HAS ANSWERED THIS QUESTION AND HAS PROVEN THAT THE INSTITUTION CAN BE SUCCESSFULLY TRANSPLANTED. THE NEW ZEALAND OMBUDSMAN, ESSENTIALLY THE SAME AS THAT FOUND IN SCANDINAVIA,<sup>17</sup> HAS SUCCESSFULLY OPERATED IN THAT COUNTRY SINCE ITS INCEPTION AND IS NOW APPLAUDED BY THE SAME CIVIL SERVANTS WHO WERE ORIGINALLY ITS STRONGEST OPPONENTS.<sup>18</sup>

THE OFFICE HAS SINCE PROVEN THAT THE NEW ZEALAND TEST WAS A VALID DEMONSTRATION OF ITS ADAPTABILITY. IN 1965 THE NEW COUNTRIES OF GUYANA AND MAURITUS ADOPTED THE OMBUDSMAN CONCEPT, AND IT HAS SHOWN ITS RELEVANCE IN THESE NEW, DEVELOPING NATIONS OF ASIA AND AFRICA.<sup>19</sup> IN 1967 A VERSION OF THE PLAN WAS ACCEPTED BY THE BRITISH, THUS SHOWING THAT THE OMBUDSMAN COULD BE USEFUL IN THE LARGER, MORE POPULOUS COUNTRIES OF THE WORLD. WE MUST NOTE HERE, HOWEVER, THAT THERE IS A MAJOR DIFFERENCE BETWEEN THE BRITISH SYSTEM AND THOSE PREVIOUSLY DISCUSSED. AS DETAILED IN THE SO-CALLED WHYATT REPORT, WHICH ORIGINALLY PROPOSED THE INSTITUTION, THE NAME DELETED FROM THE LEGISLATION AND THE "PARLIAMENTARY COMMISSIONER" IS RESTRICTED TO THE INVESTIGATION OF COMPLAINTS FORWARDED BY MEMBERS OF

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<sup>17</sup>THE OFFICE IS ESSENTIALLY THE SAME AS THOSE FOUND IN SCANDINAVIA BUT YET IS SUBJECT TO THE SAME DEGREE OF MINOR VARIATION AS FOUND THERE. IN NEW ZEALAND LOCAL AND MILITARY MATTERS ARE BEYOND THE KEN OF THE OFFICE, WHILE MINISTERIAL DECISIONS (IN A SOMEWHAT PECULIAR FASHION) AND JUDICIAL MATTERS (WITH CERTAIN LIMITATIONS) ARE WITHIN HIS JURISDICTION. GELLHORN, PP. 103-127.

<sup>18</sup>GELLHORN CITES THE PUBLIC SERVICE JOURNAL AS SAYING, "IT IS BECOMING INCREASINGLY CLEAR THAT THE OFFICE OF OMBUDSMAN IS NOT NECESSARILY THE TRAP FOR PUBLIC SERVANTS WHICH MANY OF US FACED WHEN IT WAS FIRST ESTABLISHED." GELLHORN, P. 92.

<sup>19</sup>ROWAT, P. 23.

PARLIAMENT.<sup>20</sup> NOT ONLY IS HIS POWER OF INITIATIVE RESTRICTED, BUT MANY AREAS OF GOVERNMENT CONCERN ARE PLACED OUTSIDE HIS PURVIEW. HE MAY NOT INVESTIGATE SECURITY MATTERS, POLICE ACTION, CIVIL SERVICE PERSONNEL MATTERS, THE ARMED FORCES, GOVERNMENT CONTRACTS, REGIONAL HOSPITAL BOARDS, PUBLIC CORPORATIONS, LOCAL GOVERNMENT OR ANY INCIDENT ARISING IN NORTHERN IRELAND.<sup>21</sup> THESE LIMITATIONS ON THE POWER OF THE OFFICE OBVIOUSLY AFFECT ITS NATURE. IN FACT, THE PRESS HAS TAKEN TO CALLING THE BRITISH VERSION THE "OMBUDSMOUSE."<sup>22</sup>

#### SUBSECTION B: ADMINISTRATIVE CONTROL MECHANISMS IN OTHER COUNTRIES

IT MIGHT BE HELPFUL AT THIS TIME TO EXAMINE THE INSTITUTIONS OTHER COUNTRIES HAVE DEVELOPED TO CONTROL ADMINISTRATIVE PRACTICES AND PROCEDURES. I MUST FIRST NOTE THAT EVERY COUNTRY HAS SOME SUCH CONTROL MECHANISM OR INSTITUTION. INDEED, CONTRARY TO POPULAR BELIEF IN THE UNITED STATES, THE COMMUNIST NATIONS OF EASTERN EUROPE HAVE SUCCESSFULLY DEVELOPED A NUMBER OF CONTROL DEVICES. WHILE CERTAIN WESTERN CONCEPTS SUCH AS JUDICIAL REVIEW AND CODES OF ADMINISTRATIVE PROCEDURE HAVE NOT REACHED A HIGH STATE OF DEVELOPMENT, PROGRESS HAS BEEN MADE IN OTHER AREAS. IN POLAND, FOR INSTANCE, THE PRESS AND RADIO, THOUGH SUBJECT TO STRICT CONTROL, SERVE AS WATCHDOGS OF THE BUREAUCRACY. WHILE RESTRAINT MUST BE EXERCISED, NEWSPAPER STAFFS HANDLE A TREMENDOUS VOLUME OF

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<sup>20</sup>ROWAT, P. 24.

<sup>21</sup>ROWAT, P. 24.

<sup>22</sup>ROWAT, P. 25.

COMPLAINTS. ONE SURVEY, NOW OUTDATED, FOUND THAT APPROXIMATELY 80,000 COMPLAINTS WERE RECEIVED BY THE NATION'S THIRTY-SEVEN LEADING NEWSPAPERS, AS MUCH AS EIGHTY PERCENT OF THESE INVOLVING GOVERNMENTAL ACTION.<sup>23</sup> IN ADDITION, POLISH RADIO'S BUREAU OF COMPLAINTS DEALS WITH COMPLAINTS FROM 140,000 DIFFERENT CORRESPONDENTS ANNUALLY, THE BULK OF WHICH ARE RELATED TO MATTERS OF PUBLIC ADMINISTRATION.<sup>24</sup>

IN BOTH POLAND AND THE SOVIET UNION THE OFFICE OF PUBLIC PROSECUTOR SERVES A GREATER FUNCTION THAN HERE IN THE UNITED STATES. THE OFFICE HAS BEEN DESCRIBED BY ONE SOVIET LEGAL SCHOLAR AS COMBINING THE FUNCTIONS OF OUR JUSTICE DEPARTMENT, CONGRESSIONAL INVESTIGATING COMMITTEES AND GRAND JURIES.<sup>25</sup> WHILE ITS FUNCTIONS HAVE VARIED FROM TIME TO TIME, IT HAS BEEN ACTIVE AS AN ADMINISTRATIVE CONTROL DEVICE SINCE 1955, WHEN THE SUPREME SOVIET ENACTED A NEW STATUTE COVERING THE INSTITUTION. AT THAT TIME THE "PROCURATOR" WAS EMPOWERED TO OVERSEE THE CORRECT AND UNIFORM APPLICATION OF LAW THROUGHOUT THE SOVIET UNION.<sup>26</sup> THE PROCURATOR'S STAFFMEMBERS ARE HIGHLY PAID, WELL-TRAINED PROFESSIONALS HANDLING A LARGE NUMBER OF COMPLAINTS FROM A WIDE VARIETY OF SOURCES.<sup>27</sup> IN GENERAL,

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<sup>23</sup>THE SURVEY WAS MADE IN 1959 OR 1960. GELLHORN, P. 324.

<sup>24</sup>THE MAJORITY OF THESE COMPLAINTS ORIGINATE AT THE LOWER SOCIO-ECONOMIC STRATA OF THE COUNTRY. GELLHORN, P. 326.

<sup>25</sup>H. J. BERMAN, "THE DILEMMA OF SOVIET LAW REFORM," HARVARD LAW REVIEW LXXVI (1963), PP. 929-939.

<sup>26</sup>APPARENTLY STALIN'S DEATH WAS THE PRINCIPAL INSPIRATION FOR THE EXPANSION OF THE OFFICE. GELLHORN, P. 347.

<sup>27</sup>GELLHORN, P. 349.

THE OFFICE HAS BEEN SAID TO BEAR A STRONG RESEMBLANCE TO THE SCANDINAVIAN OMBUDSMAN.<sup>28</sup>

YUGOSLAVIA IS PARTICULARLY INTERESTING FOR OUR STUDY, SINCE IT HAS A HISTORY OF AN EXTREME, ALMOST OBSESSIVE DISLIKE FOR ITS CIVIL SERVANTS.<sup>29</sup> THE OFFICE OF THE PRESIDENT AND VICE PRESIDENT ARE CONSTANTLY RECEIVING COMPLAINTS ABOUT VARIOUS ADMINISTRATIVE ACTIONS. THOUGH THIS IS NOT UNUSUAL FOR ANY GOVERNMENT, THE ATTENTION GIVEN THE COMPLAINTS IS. APPARENTLY THE STAFFS OF BOTH OF THESE EXECUTIVE OFFICERS FEEL THAT THIS IS AN IMPORTANT FUNCTION AND DO NOT MERELY FORWARD SUCH COMMUNICATIONS TO THE APPROPRIATE GOVERNMENT AGENCY. THE COMPLAINTS ARE ACTUALLY ANALYZED AND CHECKED FOR FUTURE ADMINISTRATIVE ACTION. IN A FEW INSTANCES (A COMPARATIVELY LARGE NUMBER) THE EXECUTIVE INVOLVED MAY LAUNCH HIS OWN INVESTIGATION.<sup>30</sup> IN ADDITION TO DIRECT EXECUTIVE CONTROL, THE CONSTITUTIONAL COURT, ESTABLISHED IN 1963, EXERCISES GENERAL SUPERVISION OVER THE REGULATIONS, PROGRAMS AND ACTS OF THE STATE BUREAUCRACY.<sup>31</sup> THE COURT TENDS TO VIEW INDIVIDUAL COMPLAINTS ONLY AS THEY RELATE TO THE PREVENTION OF TRENDS OF MALADMINISTRATION. IN THIS WAY IT MAY BE EVEN MORE TRUE TO THE ORIGINAL INTENTIONS OF THE OMBUDSMAN'S CREATORS THAN THE SCANDINAVIAN OFFICE ITSELF.<sup>32</sup>

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<sup>28</sup>GELLHORN, P. 367.

<sup>29</sup>GELLHORN, P. 292.

<sup>30</sup>THE OFFICES OF PRESIDENT AND VICE PRESIDENT ARE BOTH AIDED BY LARGE STAFFS IN WHAT MAY BE APPROPRIATELY DESCRIBED AS "GRIEVANCE BUREAUS." GELLHORN, P. 287.

<sup>31</sup>GELLHORN, P. 273.

<sup>32</sup>GELLHORN, P. 275.

IN ISRAEL A LARGE PART OF THE BURDEN OF SUPERVISING THE BUREAUCRACY IS PLACED ON THE STATE COMPTROLLER. UNLIKE MANY AMERICAN STATE AUDITORS WHO ARE LIMITED TO A POST-AUDIT FUNCTION AND FISCAL CONSIDERATIONS, THE ISRAELI COMPTROLLER IS DIRECTED TO DEAL WITH ADMINISTRATIVE EFFICIENCY, PROPRIETY AND ETHICS.<sup>33</sup> HE HAS NO DIRECT POWER BUT MAY ONLY ADVISE, CRITICIZE AND REPORT TO THE LEGISLATURE. AS PART OF HIS SUPERVISORY DUTIES, THE COMPTROLLER INVESTIGATES INDIVIDUAL COMPLAINTS; SUCH COMPLAINTS HAVE GROWN IN NUMBER FROM 1,300 IN 1961 TO 3,100 IN 1966.<sup>34</sup> THERE IS, HOWEVER, A MOVEMENT TO REPLACE THIS PROCEDURE WITH AN OFFICE OF OMBUDSMAN, DESPITE THE FACT THAT THE COMPTROLLER SERVES NEARLY THE SAME FUNCTION.<sup>35</sup>

JAPAN HAS DEVELOPED TWO PRINCIPAL AGENCIES FOR HANDLING CITIZEN COMPLAINTS. FIRST THERE IS THE ADMINISTRATIVE INSPECTION BUREAU (AIB), PART OF THE STATE ADMINISTRATIVE MANAGEMENT AGENCY (AMA).<sup>36</sup> THE AMA HAS GENERAL SUPERVISORY POWERS OVER THE ADMINISTRATIVE STRUCTURE, THOUGH IT WAS NOT UNTIL 1955 THAT THE OFFICE BEGAN PROCESSING INDIVIDUAL COMPLAINTS.<sup>37</sup> BY 1960 THE AIB WAS FORMED TO HANDLE THE INCREASING VOLUME OF COMPLAINTS, AND BY 1965 3,065 LOCAL ADMINISTRATIVE COUNSELORS AND THE CENTRAL BUREAU WERE RECEIVING

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<sup>33</sup>ROWAT, P. 32.

<sup>34</sup>ROWAT, P. 32.

<sup>35</sup>ROWAT, P. 33.

<sup>36</sup>THE AMA WAS DEVELOPED IN 1948 AS AN ADJUNCT OF THE PRIME MINISTER'S OFFICE. ITS DIRECTOR GENERAL IS A FULL MEMBER OF THE CABINET. GELLHORN, P. 385.

<sup>37</sup>GELLHORN, P. 386.

OVER 55,000 COMPLAINTS.<sup>38</sup> IN ADDITION TO THE AIB, THE MINISTRY OF JUSTICE HAS ESTABLISHED A CIVIL LIBERTIES BUREAU WHICH DEALS WITH A LIMITED NUMBER OF COMPLAINTS, THOUGH IT DOES NOT RESTRICT ITSELF TO CONSTITUTIONAL QUESTIONS OR EVEN GOVERNMENTAL ACTIONS.<sup>39</sup> THERE IS ONE FINAL NOTE OF INTEREST IN THE JAPANESE SYSTEM. LARGE COUNTRIES OR STATES WHICH HESITATE TO ESTABLISH A WORKING GRIEVANCE MECHANISM, SUCH AS THE OMBUDSMAN, BECAUSE OF THE LARGE STAFFS WHICH MAY BE INVOLVED MAY FIND THE JAPANESE USE OF "CITIZEN-COOPERATORS" TO AUGMENT STAFF EXTREMELY INTERESTING.<sup>40</sup>

#### SUBSECTION C: AMERICAN OMBUDSMAN

THE OMBUDSMAN INSTITUTION HAS RECEIVED A GREAT DEAL OF ATTENTION IN THE UNITED STATES AND CANADA SINCE THE EARLY SIXTIES.<sup>41</sup> IN CANADA, AT THE FEDERAL LEVEL A COMMITTEE OF THE HOUSE OF COMMONS APPROVED THE CONCEPT IN 1965, AND PRIME MINISTER PEARSON REFERRED THE MEASURE TO A ROYAL COMMISSION ON ADMINISTRATIVE BODIES.<sup>42</sup> AT THE PROVINCIAL LEVEL, ALBERTA AND NEW BRUNSWICK HAVE ADOPTED THE INSTITUTION. THE SOCIAL

<sup>38</sup>GELLHORN, P. 387.

<sup>39</sup>THE BUREAU APPARENTLY PURSUES ITS OWN VIEW OF MORALITY AND FAIRNESS IN DECIDING THE LIMITS OF ITS JURISDICTION. GELLHORN, P. 406.

<sup>40</sup>FOR A FURTHER DESCRIPTION OF JAPAN'S LOCAL ADMINISTRATIVE COUNSELORS, SEE GELLHORN, PP. 388-393.

<sup>41</sup>FOR A COMPLETE HISTORY OF THE EARLY CONSIDERATION OF THE PROPOSAL IN CANADA, SEE STANLEY ANDERSON, CANADIAN OMBUDSMAN PROPOSALS (BERKELEY, 1966). SEE ALSO DONALD ROWAT, "AN OMBUDSMAN SCHEME FOR CANADA," CANADIAN JOURNAL OF ECONOMICS AND POLITICAL SCIENCE, XII (1962), P. 543.

<sup>42</sup>ROWAT, "THE SPREAD OF THE OMBUDSMAN IDEA," P. 26.

CREDIT PARTY BROUGHT THE PROPOSAL TO FRUITION IN MARCH 1967, AND IN MAY OF THAT YEAR NEW BRUNSWICK FOLLOWED SUIT.<sup>43</sup>

AT THE FEDERAL LEVEL IN THE UNITED STATES, THE MOST PERSISTENT CONGRESSIONAL SUPPORT OF THE OMBUDSMAN HAS COME FROM HENRY S. REUSS OF WISCONSIN. IN 1964 HE PROPOSED THE ESTABLISHMENT OF AN ADMINISTRATIVE COUNSEL WHO WOULD

REVIEW THE CASE OF ANY PERSON WHO ALLEGES THAT HE BELIEVES HE HAS BEEN SUBJECTED TO ANY IMPROPER PENALTY, OR THAT HE HAS BEEN DENIED ANY RIGHT OR BENEFIT TO WHICH HE IS ENTITLED UNDER THE LAWS OF THE UNITED STATES, OR THAT THE DETERMINATION OR AWARD OF ANY SUCH RIGHT OR BENEFIT HAS BEEN ... UNREASONABLY DELAYED, AS A RESULT OF ANY ACTION OR FAILURE TO ACT ON THE PART OF ANY OFFICER OR EMPLOYEE OF THE UNITED STATES.<sup>44</sup>

A MEASURE HAS ALSO BEEN INTRODUCED CALLING FOR THE CREATION OF AN OFFICE OF "ADMINISTRATIVE OMBUDSMAN" RESPONSIBLE TO THE NATIONAL ADMINISTRATIVE CONFERENCE.<sup>45</sup> INITIALLY THIS OFFICIAL WOULD BE RESPONSIBLE FOR A LIMITED NUMBER OF AGENCIES: THE SOCIAL SECURITY ADMINISTRATION, THE VETERANS ADMINISTRATION, INTERNAL REVENUE SERVICE AND THE

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<sup>43</sup> IT IS INTERESTING TO NOTE THAT ALBERTA APPOINTED THE RETIRING HEAD OF THE ROYAL CANADIAN MOUNTED POLICE, WHILE NEW BRUNSWICK APPOINTED A FORMER PRESIDENT OF MOUNT ALLISON UNIVERSITY: CERTAINLY A WIDE VARIATION IN BACKGROUNDS. ANDERSON, "PROPOSALS AND POLITICS," P. 139, AND ROWAT, "THE SPREAD OF THE OMBUDSMAN IDEA," P. 23, BOTH IN ANDERSON, OMBUDSMAN FOR AMERICAN GOVERNMENT.

<sup>44</sup> H. S. REUSS, "AN 'OMBUDSMAN' FOR AMERICA," N. Y. TIMES MAGAZINE (SEPTEMBER 13, 1964), P. 30.

<sup>45</sup> U. S. CONGRESS, SENATE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, ADMINISTRATIVE OMBUDSMAN, 90TH CONGRESS, 2ND SESSION, 1968.

BUREAU OF PRISONS.<sup>46</sup> SENATOR LONG OF MISSOURI INTRODUCED A SIMILAR MEASURE WHICH WOULD PROVIDE FOR A REGIONAL OMBUDSMAN IN MISSOURI WHICH WOULD NOT BE RESTRICTED TO THESE FOUR AGENCIES.<sup>47</sup>

PROponents OF THE ESTABLISHMENT OF A FEDERAL OMBUDSMAN DECLARE THAT THE ADOPTION OF THIS MEASURE AT THE HIGHEST LEVEL OF GOVERNMENT IS CRITICAL.

FOR THE FEDERAL GOVERNMENT REACHES INTO EVERY STATE, AND ITS ACTIVITIES IN THE STATES OFTEN EXCEL THOSE OF STATE GOVERNMENT AND ARE, IN MANY CASES, MORE VITAL TO THE PEOPLE IN THOSE STATES.<sup>48</sup>

THE PROBLEM OF THE SIZE OF THE FEDERAL GOVERNMENT CONTINUES TO DISTURB EVEN THE HEARTIEST SPONSORS OF THE INSTITUTION. IT IS ADMITTED THAT THE AMERICAN PEOPLE, AS "CHRONIC COMPLAINERS," WOULD PREVENT THE ESTABLISHMENT OF AN OFFICE WITH UNLIMITED JURISDICTION. EVEN WITH A JURISDICTIONALLY LIMITED OFFICE, AN EXTENSIVE EDUCATIONAL CAMPAIGN MAY BE NEEDED TO INSTRUCT OUR CITIZENS AS TO THE PROPER FUNCTIONS OF THE OFFICE.<sup>49</sup>

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<sup>46</sup>SEE THE HEARINGS ON THIS CONDUCTED IN JANUARY 1968. SENATE BILL 1195, SECTION 2.

<sup>47</sup>U. S. CONGRESS, SENATE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, ESTABLISH A TWO YEAR STUDY OF THE OFFICE OF ADMINISTRATIVE OMBUDSMAN, 90TH CONGRESS, 2ND SESSION, 1968.

<sup>48</sup>AKE SANDLER, "AN OMBUDSMAN FOR THE UNITED STATES," IN THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, CCCXXVII (MAY 1968), PP. 104-108. THIS ENTIRE ISSUE OF THE PERIODICAL, HEREAFTER CITED AS THE ANNALS, IS DEVOTED TO A STUDY OF THE OMBUDSMAN.

<sup>49</sup>SANDLER, P. 110.



## OMBUDSMAN AT THE STATE LEVEL

IN 1963 CONNECTICUT STATE REPRESENTATIVE NICHOLAS B. EDDY, A REPUBLICAN, OFFERED A BILL ESTABLISHING A COMMISSIONER KNOWN AS AN OMBUDSMAN WHO WOULD BE APPOINTED BY THE LEGISLATURE AND EMPOWERED TO INVESTIGATE COMPLAINTS ON CERTAIN ADMINISTRATIVE ACTIONS.<sup>50</sup> BY 1967 SIMILAR BILLS HAD BEEN INTRODUCED IN 25 STATES.<sup>51</sup> IT WAS IN THAT YEAR THAT TWO WIDELY VARYING FORMS OF THE INSTITUTION WERE ACCEPTED, ON A CONCEPTUAL BASIS, BY THE HOUSE COMMITTEE ON STATE ADMINISTRATION IN MASSACHUSETTS.<sup>52</sup>

THE OBJECTIVES OF THE STATE SPONSORS OF THESE BILLS ARE:

... (IN ROUGHLY DESCENDING ORDER OF PRIORITY):  
 (1) REDRESS OF INDIVIDUAL GRIEVANCES; (2) COLLECTIVE PROTECTION AGAINST IMPROPER AND INEFFICIENT ADMINISTRATION; (3) INCREASED PUBLIC CONFIDENCE IN ADMINISTRATION, AND REDUCED CITIZEN ALIENATION FROM A BURGEONING AND REMOTE GOVERNMENT; (4) IMPROVED PERFORMANCE OF LEGISLATIVE FUNCTIONS THROUGH PROVISION OF CONTINUOUS OVERSIGHT, THROUGH IDENTIFICATION OF RECURRING PROBLEMS WHICH MAY REQUIRE CORRECTIVE LEGISLATION, AND THROUGH ALLEVIATION OF THE COMPLAINT HANDLING BURDEN PRESENTLY BORNE BY STATE LEGISLATORS AND THEIR STAFF; (5) PROTECTION OF CIVIL SERVANTS AGAINST UNFOUNDED CRITICISM CONTRIBUTING IN TURN TO THE IMPROVEMENT OF THEIR MORALE.<sup>53</sup>

ALTHOUGH NO ONE OBJECTS TO THESE LAUDABLE GOALS, MANY SERIOUS QUESTIONS ARE RAISED BY CRITICS OF THESE MEASURES, QUESTIONS PERTAINING TO THE RELATION OF THE OFFICE TO EXISTING FORMAL AND INFORMAL INSTITUTIONS. THE MOST CRITICAL OF THESE

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<sup>50</sup> JESSE M. UNRUH, "THE OMBUDSMAN IN THE STATES," THE ANNALS, P. 112.

<sup>51</sup> U. S. CONGRESS, SENATE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, OMBUDSMAN: COMPILATION OF STATE PROPOSALS, 90TH CONGRESS, 1ST SESSION, 1967.

<sup>52</sup> U. S. CONGRESS, OMBUDSMAN: COMPILATION OF STATE PROPOSALS, P. 81.

<sup>53</sup> JOHN E. MOORE, "STATE GOVERNMENT AND THE OMBUDSMAN," ANDERSON, PP. 70-71.

RELATIONSHIPS IS BETWEEN THE OMBUDSMAN AND STATE LEGISLATORS.<sup>54</sup>  
 THERE IS SOME REASON TO BELIEVE THAT THE INDIVIDUAL LEGISLATOR  
 (THOUGH NOT NECESSARILY THE LEGISLATOR'S STAFF) MAY VIEW  
 HIS "CASE WORK" OR COMPLAINT HANDLING AS A POLITICAL  
 NECESSITY, AND THUS OPPOSE THE INTRODUCTION OF THE OMBUDSMAN.<sup>55</sup>

IN MAY 1967 HAWAII BECAME THE FIRST STATE TO CREATE  
 AN OMBUDSMAN. A BILL INTRODUCED BY DEMOCRATIC STATE SENATOR  
 DUKE KOWASKI WAS ENACTED BY THE LEGISLATURE AND ALLOWED TO  
 BECOME LAW WITHOUT THE SIGNATURE OF GOVERNOR JOHN BURNS.<sup>56</sup>  
 HOWEVER, DESPITE THE FACT THAT HAWAII ACTED FIRST, CALIFORNIA  
 HAS BEEN THE SITE OF THE GREATEST CONTROVERSY OVER THE  
 OMBUDSMAN. THE MEASURE IS HOTLY DEBATED EACH TIME IT IS  
 INTRODUCED IN THE LEGISLATURE.<sup>57</sup> SPEAKER OF THE CALIFORNIA  
 ASSEMBLY JESSE UNRUH IS THE PRINCIPAL BACKER OF THE BILL;  
 INDEED, HE IS AN OUTSTANDING PROPONENT OF THE INSTITUTION  
 IN THE ENTIRE COUNTRY. SINCE 1965, HOWEVER, THE MEASURE  
 HAS BEEN PASSED OUT OF THE ASSEMBLY EACH YEAR, ONLY TO BE  
 DEFEATED IN THE SENATE.<sup>58</sup> IT IS APPARENT THAT THE BILL  
 IS BEING DELAYED PRINCIPALLY ON POLITICAL GROUNDS, WITH THE  
 REPUBLICAN MINORITY IN THE CALIFORNIA ASSEMBLY AND THE  
 REPUBLICAN MAJORITY IN THE SENATE MOVING ALONG PARTY LINES  
 TO DEFEAT SPEAKER UNRUH'S LEGISLATION.<sup>59</sup>

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<sup>54</sup>THE STUDY OF THESE INSTITUTIONAL RELATIONSHIPS WILL BE  
 DEVELOPED TO A GREATER DEGREE LATER IN THE PAPER.

<sup>55</sup>MOORE, P. 83.

<sup>56</sup>UNRUH, P. 112. SEE ALSO APPENDIX B WHERE THE BILL IS  
 INTRODUCED.

<sup>57</sup>MOORE, P. 72.

<sup>58</sup>UNRUH, P. 113.

<sup>59</sup>UNRUH, P. 121.

## OMBUDSMAN IN MASSACHUSETTS

IN 1965 MASSACHUSETTS JOINED FIVE OTHER STATES IN THE INTRODUCTION OF LEGISLATION CALLING FOR THE ESTABLISHMENT OF A STATE OMBUDSMAN.<sup>60</sup> THE MEASURE WAS NOT PASSED, PROBABLY DUE AT LEAST IN PART TO THE STRONG OPPOSITION OF STATE LEGISLATORS WHO VIEW CASEWORK AS AN EXTREMELY IMPORTANT FUNCTION OF THEIR OFFICE.<sup>61</sup>

IN 1967 A BILL WAS INTRODUCED TO THE MASSACHUSETTS HOUSE OF REPRESENTATIVES WHICH HAS SINCE RECEIVED A GREAT DEAL OF FAVORABLE COMMENT. HOUSE BILL 2677, A PROPOSAL OF THEN SECRETARY OF THE COMMONWEALTH KEVIN H. WHITE, WAS SUBMITTED BY REPRESENTATIVE JAMES R. NOLEN.<sup>62</sup> THE BILL, CREATING A "MASSACHUSETTS INFORMATION AND REFERRAL AGENCY OF THE OFFICE OF THE OMBUDSMAN," WAS DESIGNED TO SERVE A THREEFOLD FUNCTION: (1) MONITOR THE RECORDS AND PROCEDURES OF ALL ADMINISTRATIVE BOARDS OF APPEAL; (2) PROVIDE INFORMATION ON THE PURPOSE, SCOPE AND PROCEDURES OF ALL MAJOR STATE PROGRAMS; AND (3) INVESTIGATE COMPLAINTS OF ADMINISTRATIVE ACTION OR INACTION.<sup>63</sup>

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<sup>60</sup>THE OTHER STATES WERE CALIFORNIA, CONNECTICUT, ILLINOIS, NEW YORK AND UTAH. ANDERSON, "PROPOSALS AND POLITICS," OMBUDSMAN FOR AMERICAN GOVERNMENT?, P. 136.

<sup>61</sup>ONE SURVEY OF STATE LEGISLATORS IN THE COMMONWEALTH SHOWED THAT THEY VIEWED CASEWORK AS THEIR MOST IMPORTANT FUNCTION. GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (CAMBRIDGE, 1966), P. 136.

<sup>62</sup>THE BILL IS SIMILAR TO HOUSE BILL 672 REPRINTED IN APPENDIX C. ANDERSON, "PROPOSALS AND POLITICS," OMBUDSMAN FOR AMERICAN GOVERNMENT? P. 157.

<sup>63</sup>ANDERSON, "PROPOSALS AND POLITICS," P. 157. SEE ALSO HOUSE BILL 1519 SUBMITTED IN 1969 BY REPRESENTATIVE NOLEN OF WARE.

## OMBUDSMAN FOR LOCAL GOVERNMENT

THEORETICALLY, THE LOWEST LEVEL OF GOVERNMENT -- LOCAL UNITS OF GOVERNMENT IN THE UNITED STATES -- PROVIDE MOST OF THE PUBLIC SERVICES WE CONSUME. THESE LOCAL UNITS ARE ON THE FRONT LINE OF MEETING THE CRITICAL NEEDS OF THE COMMUNITY. EDUCATION, POLICE AND FIRE PROTECTION, SANITATION AND TRANSPORTATION ARE ALL PRODUCTS PROVIDED BY LOCAL GOVERNMENT. IT WOULD SEEM THEN THAT THE CITIES ARE MOST IN NEED OF THE OFFICE OF OMBUDSMAN. BUT CRITICS OF SUCH AN URBAN INSTITUTION DECLARE THAT IT CANNOT SUCCEED SINCE

THE CURRENT PROBLEMS OF URBAN AND METROPOLITAN AREAS IN THE BIGGER CITIES SEEM TOO ENORMOUS TO PERMIT THEIR SOLUTION THROUGH THE EFFORTS OF THE OFFICE OF OMBUDSMAN, AND IN THE SMALLER COMMUNITIES ... THE OMBUDSMAN IS NOT LIKELY TO BE EFFECTIVE BECAUSE OF THE CONTROL OF POWER BY ONE PERSON OR BY A VERY SMALL GROUP.<sup>64</sup>

ARE THESE OBSERVATIONS VALID? WILL THE AGENCY BE OVERWHELMED OR DISREGARDED BY THE COMMUNITY POWER STRUCTURE? DOES THE OFFICE HAVE A MEANINGFUL ROLE TO PLAY IN LOCAL GOVERNMENT? IT IS OBVIOUS THAT THESE AREAS OF CONCERN HAD TO BE INVESTIGATED BEFORE A MEANINGFUL DIALOGUE COULD TAKE PLACE.

ONE OF THE FIRST EXPERIMENTS WITH AN URBAN OMBUDSMAN CAME IN 1962 WHEN A "WATCHDOG" COMMITTEE APPOINTED BY MAYOR DILLWORTH OF PHILADELPHIA RECOMMENDED THE ESTABLISHMENT OF A LOCAL OFFICE SIMILAR TO THOSE FOUND IN SCANDINAVIA. THIS NEW OFFICE, TO BE HEADED BY A COMMISSIONER OF PUBLIC AFFAIRS APPOINTED BY THE CITY COUNCIL, WAS THE SUBJECT OF BITTER CRITICISM FROM A VARIETY OF SOURCES AND THUS WAS NEVER ESTABLISHED.<sup>65</sup>

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<sup>64</sup>FRANK P. ZEIDLER, "AN OMBUDSMAN FOR CITIES?" THE ANNALS, P. 125

<sup>65</sup>WILLIAM H. ANGUS AND MILTON KAPLAN, "THE OMBUDSMAN AND LOCAL GOVERNMENT," ANDERSON, P. 103.

SINCE THAT TIME EFFORTS TO CREATE AN OMBUDSMAN FOR LOCAL GOVERNMENT HAVE BEEN MADE IN NEW YORK CITY, OAKLAND, AND WASHINGTON, D. C., TO NAME JUST A FEW AREAS. MANY OF THESE PROPOSALS MERELY CONTEMPLATE THE ESTABLISHMENT OF AN EXECUTIVE COMPLAINT BUREAU. OTHER PROPOSALS CALL FOR A LIMITED EXPERIMENT WITH THE INSTITUTION. ONLY RARELY DO WE FIND SERIOUS SUPPORT FOR AN INSTITUTION ALONG THE TRUE SCANDINAVIAN MODEL AS WE DID IN PHILADELPHIA.<sup>66</sup>

ONE INSTANCE OF SUCH ACTIVITY TOOK PLACE IN NASSAU COUNTY, NEW YORK. IN MAY OF 1966 COUNTY EXECUTIVE EUGENE NICKERSON APPOINTED FORMER JUDGE SAMUEL GREASON AS PUBLIC PROTECTOR BY EXECUTIVE ORDER. LATER, THE COUNTY BOARD OF SUPERVISORS APPROVED OF THE CREATION OF SUCH AN AGENCY AND CALLED FOR A REFERENDUM. ON NOVEMBER 7, 1967, AFTER JUDGE GREASON HAD BEEN OPERATING WITH A FAIR DEGREE OF SUCCESS FOR EIGHTEEN MONTHS, THE PROPOSAL WAS DEFEATED BY A VOTE OF 261,902 TO 196,260.<sup>67</sup>

MORE RECENTLY, AN EXPERIMENT WITH THE INSTITUTION HAS TAKEN PLACE IN BUFFALO, NEW YORK. IT WAS ESTABLISHED UNDER A FEDERAL GRANT MADE TO THE STATE LAW SCHOOL BY THE OFFICE OF ECONOMIC OPPORTUNITY. OPERATING WITH THE CONSENT OF CITY

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<sup>66</sup>MANY EXAMPLES OF SUCH PROPOSALS ARE AVAILABLE. THE AUTHORS DEVOTE SOME TIME TO EXAMINING THE MANY OMBUDSMAN PROPOSALS BUT INDICATE THAT, AS ALWAYS, THE TERM IS USED FOR A VARIETY OF STRUCTURAL DEVICES. ANGUS AND KAPLAN IN ANDERSON, P. 103.

<sup>67</sup>ANGUS AND KAPLAN, PP. 112-118.

OFFICIALS WHO HAD NOTED THE GROWING POPULARITY OF NEWS-  
PAPER COMPLAINT COLUMNS, THE PROJECT ACTUALLY BEGAN WITH THE  
WORK OF FACULTY AND STUDENTS OF THE STATE UNIVERSITY LAW  
SCHOOL. AFTER RECEIPT OF THE GRANT, AN OMBUDSMAN WAS APPOINTED  
AND LAW STUDENTS WERE HIRED TO PROCESS COMPLAINTS.<sup>68</sup> THOUGH  
THE OFFICE HAS RECEIVED THE ENTHUSIASTIC SUPPORT OF LOW-INCOME  
AND MINORITY GROUPS, THE CITY COUNCIL HAS BITTERLY OPPOSED IT  
SINCE ITS INCEPTION AND THUS THE PROJECT WAS DISCONTINUED  
IN APRIL 1969.<sup>69</sup>

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<sup>68</sup>ANGUS AND KAPLAN, PP. 121-133.

<sup>69</sup>CONVERSATION WITH M. KAPLAN, THE PROJECT SUPERVISOR  
FROM THE LAW SCHOOL, AND L. TILBLES, ASSISTANT TO THE  
OMBUDSMAN. THE AUTHOR WAS INVOLVED BOTH IN THE INITIAL  
PHASES OF THE EXPERIMENT DESCRIBED IN MR. KAPLAN'S ARTICLE  
AND IN ESTABLISHING THE OFFICE UNDER THE FEDERAL GRANT.

## SECTION II

RELATION OF THE OMBUDSMAN TO THE  
STRUCTURE OF AMERICAN GOVERNMENT

## SUBSECTION A: NEED FOR AN AMERICAN OMBUDSMAN

DESPITE THE FACT THAT THE CONCEPT OF AN OMBUDSMAN HAS RECEIVED FAVORABLE ATTENTION IN MANY COUNTRIES AROUND THE WORLD, INCLUDING AMERICA, WE ARE STILL LEFT WITH THE QUESTION OF THIS COUNTRY'S NEED FOR SUCH AN INSTITUTION. WHY ARE NOT THE OTHER INSTITUTIONS OF THE LEGISLATIVE, EXECUTIVE OR JUDICIAL BRANCH ADEQUATE TO THE TASK? THE REFORM OF ADMINISTRATIVE PROCEDURES AND THE PROCESSING OF A CITIZEN'S GRIEVANCE AGAINST THE BUREAUCRACY ARE MATTERS OF DAY-TO-DAY ROUTINE IN GOVERNMENT. OTHER COUNTRIES MAY NEED SUCH AN OFFICE, BUT WE IN THE COMMONWEALTH OF MASSACHUSETTS AND IN THE UNITED STATES IN GENERAL HAVE A HISTORY OF BEING FREE AND VOCAL IN THE CRITICISM OF ADMINISTRATION AND THE LODGING OF CITIZENS' COMPLAINTS. WHY ALL THIS FUSS ABOUT A "NEW CONCEPT?" IS IT THAT WE ARE SO POORLY SERVED BY THE PRESENT FEDERAL, STATE AND LOCAL GOVERNMENT WORKERS? EVEN FOR THE PROPONENTS OF THE OMBUDSMAN THE ANSWER TO THIS LAST QUESTION IS AN EMPHATIC "No." WALTER GELLHORN HAS NOTED:

WE AMERICANS ARE BEING FAR MORE ABLY SERVED THAN MOST OF US KNOW, OR AT LEAST SAY; MANY HIGHMINDED, CAPABLE MEN AND WOMEN ARE DEVOTING THEMSELVES TO PUBLIC SERVICE; THE GENERAL LEVEL OF GOVERNMENTAL PERFORMANCE IN THE UNITED STATES IS SO HIGH THAT WE CAN NOW SENSIBLY CONSIDER HOW TO MAKE IT MORE CONSISTENTLY EXCELLENT, RATHER THAN MERELY TOLERABLY GOOD. AMERICAN PUBLIC SERVANTS DESERVE MUCH MORE APPLAUSE THAN THEY USUALLY GET.<sup>70</sup>

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<sup>70</sup> WALTER GELLHORN, WHEN AMERICANS COMPLAIN, VII.

IN ADDITION TO THIS LAUDABLE SEARCH FOR EXCELLENCE, WE MUST LOOK TO THE GROWTH OF GOVERNMENTAL ACTIVITIES IN RECENT YEARS TO ANSWER THE QUESTION OF THE SUDDEN INTEREST IN THE OMBUDSMAN. THIS INCREASE IN ACTIVITY HAS TAKEN PLACE AT EVERY LEVEL OF GOVERNMENT. A MAJOR EFFORT TO IMPROVE EDUCATION, HEALTH, AND THE GENERAL CONDITIONS OF LIVING FOR LOW-INCOME AND MINORITY GROUPS HAS BEEN THE HALLMARK OF RECENT GOVERNMENTAL ACTIVITY. THERE IS EVERY REASON TO BELIEVE THAT SUCH PROGRAMS WILL EXPAND RATHER THAN DECLINE IN THE YEARS TO COME.<sup>71</sup>

INCREASING THE LEVEL OF GOVERNMENT ACTIVITY MEANS INCREASING THE CONTACT BETWEEN THE RECIPIENT OF THESE SERVICES AND THE GOVERNMENT ADMINISTRATOR. THIS IN TURN PROVIDES GREATER OPPORTUNITY FOR THE DEVELOPMENT OF FRICTION BETWEEN THE PUBLIC SERVANT AND THE CITIZEN MASTER. INCREASED ACTIVITY ALSO MEANS THAT NEW PROGRAMS AND PROCEDURES WILL BE INSTITUTED IN A VARIETY OF FUNCTIONAL AREAS. IT WILL BE NECESSARY TO MONITOR THESE NEW PROCEDURES TO INSURE THAT INDIVIDUAL CITIZENS ARE FAIRLY AND COURTEOUSLY TREATED IN THE ADMINISTRATIVE PROCESS. MALFUNCTIONS IN THIS PROCESS WHICH FORM A PATTERN, IDENTIFIED IN THE INVESTIGATION OF INDIVIDUAL COMPLAINTS, SHOULD BE EXPOSED TO THE GLARE OF PUBLIC SCRUTINY AND THE CORRECTION OF LEGISLATIVE REFORM.

THE ADEQUACY OF EXISTING GOVERNMENTAL INSTITUTIONS REMAINS, HOWEVER, A CRITICAL POINT IN NEED OF FURTHER

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<sup>71</sup>EVEN THE CHANGE IN PRESIDENTIAL ADMINISTRATION SHOULD NOT REVERSE THIS TREND. THOUGH NIXON HAS NOT WHOLEHEARTEDLY ENDORSED THE JOHNSONIAN WAR ON POVERTY, NEITHER HAS HE REPUDIATED IT.



EXAMINATION. WHAT ARE THESE INSTITUTIONS, AND HOW MIGHT THEY BE IMPROVED?

### THE COURTS AND JUDICIAL REVIEW

THE UNITED STATES JUDICIAL SYSTEM, WHETHER AT THE FEDERAL, STATE OR LOCAL LEVEL, HAS A SUBSTANTIAL ROLE TO PLAY IN THE CONTROL OF ADMINISTRATIVE BEHAVIOR. CAN WE EXPECT THE JUDICIARY TO EXPAND THIS SUPERVISORY FUNCTION ADEQUATELY SO AS TO MAKE THE CREATION OF AN OMBUDSMAN UNNECESSARY? FIRST, WE MUST SAY THAT THE USE OF THE COURTS TO CHALLENGE AN ADMINISTRATIVE DECISION IS AN EXTREMELY COSTLY PROCESS IN MOST INSTANCES. IT IS DIFFICULT FOR EVEN WEALTHY BUSINESSES TO AFFORD THIS REVIEW MECHANISM.<sup>72</sup> OBVIOUSLY THE WELFARE RECIPIENT, THE PRISON INMATE OR THE RECIPIENT OF GOVERNMENT SERVICES FOR THE POOR FINDS IT EVEN MORE DIFFICULT. AS WE NOTED PREVIOUSLY THERE IS A NOTICEABLE TREND TOWARD INCREASING SERVICES TO THE POOR. THIS IS THE AREA WHERE INCREASING FRICTION WILL OCCUR, I.E., WHERE JUDICIAL REVIEW IS LESS LIKELY TO BE SIGNIFICANT BECAUSE OF PROHIBITIVE COST.

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<sup>72</sup>KENNETH C. DAVIS, ADMINISTRATIVE LAW: CASES, TEXTS AND PROBLEMS (1960), p. 18. OF COURSE, MUCH OF WHAT WE SAY IS A GENERAL COMMENT ON THE JUDICIAL PROCESS AS IT IS COMPARED WITH THE LESS FORMAL ADMINISTRATIVE PROCESSES. IN SPEAKING OF THE JUDICIAL PROCESS ONE COMMENTATOR HAS REMARKED, "LITIGATION HAS BECOME COSTLY BEYOND THE ABILITY OF THE AVERAGE PERSON TO BEAR. ITS TECHNICAL RULES OF PROCEDURE ARE OFTEN TRAPS FOR THE UNWARY, AND TECHNICAL RULES OF EVIDENCE OFTEN PREVENT COMMONSENSE DETERMINATIONS ON INFORMATION WHICH WOULD BE REGARDED AS ADEQUATE FOR ANY BUSINESS DECISION." PRESIDENT ROOSEVELT WAS SPEAKING IN 1940, THOUGH THE SAME RESTRICTIONS ON THE JUDICIAL PROCESS MAY BE NOTED TODAY. HOUSE DOCUMENT No. 986, 76TH CONGRESS, 3RD SESSION 1-2 (1940), CITED IN DAVIS ABOVE.

MONEY IS NOT THE ONLY COST FACTOR. TIME IS ALSO CRITICAL. THE JUDICIAL MILL GRINDS EXCEEDINGLY FINE AT THE COST OF EXTENSIVE DELAYS. PETITIONERS TO THE COURTS MUST FIRST "EXHAUST" ADMINISTRATIVE REMEDIES BEFORE THEY MAY EXHAUST THEMSELVES WITH THE TEDIUM OF JUDICIAL HEARING AND APPELLATE REVIEW.<sup>73</sup>

THE QUESTION OF "JUSTICIABILITY" IS ALSO OF CONCERN. HAS A LEGALLY RECOGNIZED RIGHT BEEN ABUSED? IS THIS THE APPROPRIATE FORUM UNDER STATE OR FEDERAL LAW OR CONSTITUTION?<sup>74</sup> EVEN IF THERE IS NO DOUBT THAT THE COURTS HAVE THE POWER TO LOOK INTO A MATTER, THERE REMAINS THE POLICY QUESTION OF THE APPROPRIATE FORUM. IF THE COURTS WERE SELECTED AS THE INSTITUTION FOR REDRESSING THE MINOR GRIEVANCES OF CITIZENS DISENCHANTED WITH GOVERNMENT OPERATIONS AND PROCEDURES, THEY WOULD SOON FIND TIME FOR LITTLE ELSE.

FINALLY, WE SHOULD EXAMINE THE PROCESS ITSELF. THE FORMAL TENDERING OF A COMPLAINT, THE PRECISE RULES OF EVIDENCE AND THE LIMITED CORRECTIONAL DEVICES AT THE DISPOSAL OF THE COURTS ALL TEND TO ARGUE IN FAVOR OF A MORE FLEXIBLE APPROACH TO THE CONTROL OF ADMINISTRATIVE BEHAVIOR. GOVERNMENT OFFICIALS CONSTANTLY CALLED TO THE FORMAL BAR OF JUSTICE TO EXPLAIN THEIR ACTIONS AND DECISIONS WOULD TEND TO "COVER THEMSELVES" WITH AN ELABORATE SYSTEM OF FORMAL ADMINISTRATIVE

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<sup>73</sup>THE EXCEPTIONS TO THE JUDICIAL REQUIREMENT OF PRIOR EXHAUSTION OF ADMINISTRATIVE REMEDIES WHEN SUCH ACTIONS BECOME IMPROBABLE OR EXTREMELY DELAYED DO NOT CORRECT THE SITUATION. DAVIS, P. 390.

<sup>74</sup>WE ARE INCLUDING UNDER THE HEADING OF JUSTICIABILITY THE MANY TECHNICAL PROBLEMS PETITIONERS MAY FACE, SUCH AS STANDING AND JURISDICTION. GELLHORN, WHEN AMERICANS COMPLAIN, P. 27.

DECISION MAKING IN ORDER TO REDUCE THE CHANCE OF JUDICIAL CRITICISM.<sup>75</sup> BUREAUCRATS, ALREADY SENSITIVE TO THE NEED FOR WRITTEN STATEMENTS AND APPROPRIATE FORMS, WOULD BECOME EVEN MORE SO IN THE FACE OF JUDICIAL SCRUTINY. IN ADDITION, COURTS WOULD REMAIN UNABLE TO CONTINUOUSLY MONITOR THE ADMINISTRATIVE PROCESS AND WOULD ONLY BE ABLE TO SOLVE DISPUTES THEN BEING LITIGATED. ISSUES OF FUTURE ADMINISTRATIVE BEHAVIOR AND CORRECTIVE MEASURES DESIGNED TO EFFECT PATTERNS OF ABUSE ARE REALISTICALLY BEYOND THE PURVIEW OF THE COURTS.<sup>76</sup> ONE INSTANCE OF THIS DIFFICULTY CAN BE SEEN IN THE SUPREME COURT'S ATTEMPT TO REGULATE POLICE CONDUCT REGARDING ILLEGAL SEARCHES AND INVOLUNTARY CONFESSIONS. THERE CAN BE NO DOUBT THAT THE JUDICIAL SUPERVISION OF POLICE IN THESE AREAS WAS AND IS AN ABSOLUTE NECESSITY. IT MUST ALSO BE SAID, HOWEVER, THAT IF OTHER MECHANISMS FOR CONTROL OF POLICE CONDUCT HAD BEEN AVAILABLE, THE PRESENT OUTCRY AGAINST OUR JUDICIAL SYSTEM MIGHT HAVE BEEN REDUCED. THIS IS EQUALLY TRUE IN OTHER AREAS WHERE THE JUDICIARY HAS A LIMITED ARRAY OF REMEDIES AND A LIMITED CAPACITY TO SUPERVISE ADMINISTRATIVE BEHAVIOR.

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<sup>75</sup>THE COURTS ENCOURAGE FORMAL ADMINISTRATIVE ACTION. THE REQUIREMENT OF A FAIR HEARING PROVIDING AN "OPPORTUNITY FOR THE AGGRIEVED CITIZEN TO BE HEARD IS RIGIDLY ENFORCED." SEE FRANK E. COOPER, STATE ADMINISTRATIVE LAW (1965), PP. 361-366.

<sup>76</sup>WILLIAM B. GWYN, "TRANSFERRING THE OMBUDSMAN," ANDERSON, OMBUDSMAN FOR AMERICAN GOVERNMENT? PP. 43-44. FOR AN EXCELLENT TREATMENT IN TWO PARTS OF THE USE OF THE EXCLUSIONARY RULE TO CONTROL POLICE CONDUCT, SEE W. LA FAVE, IMPROVING POLICE PERFORMANCE THROUGH THE EXCLUSIONARY RULE, PART I CURRENT POLICE AND LOCAL COURT PRACTICES, PART II DEFINING THE NORMS AND TRAINING THE POLICE, 30 MISSOURI L. REV. (1965), 391, 566.

THE LEGISLATURE: STATUTORY REFORM AND CASEWORK

ONE OF THE MOST IMPORTANT FUNCTIONS OF THE LEGISLATURE IS THE SUPERVISION OF THE EXECUTIVE BRANCH OF GOVERNMENT.

SPEAKING OF THE CONGRESS, IT HAS BEEN SAID:

TODAY LEGISLATIVE OVERSIGHT HAS BECOME A IF NOT THE PRINCIPAL ACTIVITY OF THE STANDING COMMITTEES OF BOTH HOUSES.... WITH A MANDATE TO WATCH, CONTINUOUSLY, EQUIPPED WITH STAFFS AND FUNDS, "COMMITTEE GOVERNMENT" IN OUR TIME HAS THUS ACQUIRED NEW SIGNIFICANCE AS A SYSTEM OF INSPECTION AND REVIEW OF ADMINISTRATIVE PERFORMANCE.<sup>77</sup>

WHILE THIS STATEMENT MAY BE LESS TRUE IN STATE GOVERNMENT, OTHER MEANS OF CONTROLLING EXECUTIVE BEHAVIOR ARE AVAILABLE TO THE LEGISLATURE. ADMINISTRATIVE AGENCIES CAN BE CREATED OR ELIMINATED. RULES OF ADMINISTRATIVE PROCEDURE MAY BE PROSCRIBED. THE BUDGETARY PROCESS MAY ALSO BE USED AS A CONTROL MECHANISM.

WHY CANNOT WE RELY ON THE LEGISLATURE TO MONITOR ADMINISTRATIVE PROCEDURES AND PROPOSE SUCH REFORMS AS ARE NECESSARY? FIRST, WE MUST NOTE THAT THE OMBUDSMAN IS NOT INTENDED TO REPLACE THE LEGISLATURE AS THE SUPERVISOR OF THE EXECUTIVE BRANCH. IT IS INTENDED THAT OUR SYSTEM OF CHECKS AND BALANCES AMONG THE VARIOUS BRANCHES OF GOVERNMENT WILL BE IMPROVED BY PROVIDING THE LEGISLATURE WITH GREATER INFORMATION ON CURRENT ADMINISTRATIVE PRACTICES. THE OFFICE IS ABLE TO DETECT PATTERNS OF MALADMINISTRATION. IT THEN PROPOSES REFORMS TO THE LEGISLATURE IN THE OMBUDSMAN'S ANNUAL REPORT TO THAT BODY. THE ULTIMATE IMPOSITION OF CONTROLS OR NEW CONTROL

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<sup>77</sup>G. GALLOWAY, HISTORY OF THE HOUSE OF REPRESENTATIVES (NEW YORK, 1961), PP. 185-188. THE DEVELOPMENT OF THE SUBCOMMITTEE ON LEGISLATIVE OVERSIGHT AND THE COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENT ARE EXAMPLES OF THIS GROWING FUNCTION, AND RECENT CONGRESSIONAL ACTIONS MAY INDICATE A "TREND TOWARD PARTICIPATION OF CONGRESS IN THE ACTUAL ADMINISTRATION OF THE LAWS."

MECHANISMS IS THEN LEFT TO THE LEGISLATURE.

THE PROCESSING OF INDIVIDUAL COMPLAINTS IS ALSO CONSIDERED AN IMPORTANT FUNCTION OF FEDERAL, STATE AND LOCAL LEGISLATORS. IN MASSACHUSETTS LEGISLATORS SAY THEY SPEND MUCH OF THEIR TIME, WHILE IN SESSION OR IN RECESS, IN CONSTITUENT SERVICES.<sup>78</sup> AT THE FEDERAL LEVEL THE SITUATION IS MUCH THE SAME. "'WHY IN THE WORLD,' A SENATOR RECENTLY ASKED, 'WOULD ANYONE WANT TO HAVE ANOTHER OMBUDSMAN IN WASHINGTON? AFTER ALL, WE HAVE 535 OF THEM ALREADY, IN CONGRESS.'" <sup>79</sup> CONSTITUENT SERVICE, OR CASEWORK, IS SUPPOSED TO BE POLITICALLY REWARDING AS WELL. NEW CONGRESSMEN ARE TOLD THAT THEIR POLITICAL LIFE MAY DEPEND ON THE ATTENTION THEY DEVOTE TO THEIR MAIL. ONE EXPERT OBSERVER BELIEVES THAT POLITICAL SELF-INTEREST MAY BE THE PRIME MOTIVATION BEHIND SUCH CASEWORK ACTIVITY.<sup>80</sup>

CASEWORK OFTEN PROVIDES A LEGISLATOR WITH HIS MOST CONTINUOUS AND, SOME BELIEVE, MOST REWARDING CONTACT WITH HIS CONSTITUENCY. ONE CONGRESSMAN HAS SAID THAT THREE HUNDRED CASES A WEEK ARE CHANNELLED THROUGH HIS OFFICE, AND A U. S. SENATOR FROM A POPULOUS STATE MAY RECEIVE THOUSANDS OF LETTERS EACH WEEK.<sup>81</sup> ONE SURVEY HAS INDICATED, HOWEVER, THAT ONLY A SMALL NUMBER OF THESE CASES ARE ACTUALLY CITIZEN

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<sup>78</sup> MASSACHUSETTS LEAGUE OF WOMEN VOTERS, THE GREAT AND GENERAL COURT: THE LEGISLATURE OF THE COMMONWEALTH OF MASSACHUSETTS (1965), PP. 26-27.

<sup>79</sup> WHEN AMERICANS COMPLAIN, P. 57.

<sup>80</sup> WHEN AMERICANS COMPLAIN, PP. 73-77.

<sup>81</sup> WHEN AMERICANS COMPLAIN, P. 58.

GRIEVANCES, PERHAPS AS FEW AS THREE PER WEEK PER REPRESENTATIVE.<sup>82</sup>

AGAIN, WE MUST POINT OUT THAT THE OFFICE OF OMBUDSMAN IS NOT INTENDED TO SUPPLANT A LEGISLATOR IN HIS CASEWORK, BUT MERELY TO SUPPLEMENT THESE VITAL ACTIVITIES. HERE IN THE COMMONWEALTH LEGISLATIVE STAFF IS LIMITED, AND THE LEGISLATORS OF BOTH THE HOUSE AND THE SENATE ARE HARD PRESSED TO ADEQUATELY PERFORM OTHER CRITICAL LEGISLATIVE FUNCTIONS.<sup>83</sup> THE OMBUDSMAN MAY BE A PARTIAL ANSWER TO THIS MALADY. HE WILL BE ABLE TO REMOVE A SMALL PART OF THE LEGISLATOR'S BURDEN BY ASSUMING RESPONSIBILITY FOR COMPLAINTS AGAINST GOVERNMENT ACTIVITY. OF COURSE, THE LARGEST PART OF THE CASEWORK, INFORMATION AND OTHER REQUESTS WOULD CONTINUE TO BE HANDLED DIRECTLY BY THE LEGISLATOR.<sup>84</sup>

AS NOTED PREVIOUSLY, POLITICAL SELF-INTEREST MAY CAUSE MANY LEGISLATORS TO VIEW SUCH CASES WITH A PROPRIETARY ATTITUDE. THIS POLITICAL INTEREST AND BIAS IS HEALTHY IN OUR DEMOCRATIC SYSTEM. IT SHOULD NOT LEAD, HOWEVER, TO A

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<sup>82</sup>WALTER GELLHORN SAMPLED THE MAIL OF TEN CONGRESSMEN FROM A VARIETY OF GEOGRAPHICAL AREAS ON DIFFERENT DAYS DURING WIDELY SEPARATED WEEKS FROM JANUARY TO OCTOBER 1965. WHILE THE STUDY DID NOT PRODUCE HARD STATISTICS ACCORDING TO THE AUTHOR'S OWN ADMISSION, IT IS THE MOST INTERESTING, UP TO DATE, FACTUAL STUDY OF CONGRESSIONAL CASEWORK AVAILABLE. WHEN AMERICANS COMPLAIN, P. 65.

<sup>83</sup>SEE COUNCIL OF STATE GOVERNMENTS, LEGISLATIVE STAFF IMPROVEMENT SURVEY (RM 417), TABLE F. WHILE MASSACHUSETTS IS NOT MUCH WORSE OFF THEN MANY OF HER SISTER STATES, THE STAFFING SITUATION IS GENERALLY DEPLORABLE. SEE ALSO COUNCIL OF STATE GOVERNMENTS, LEGISLATIVE REFERENCE BUREAUS AND LIBRARY SERVICES (RM 339) (1960) FOR AN EARLIER VIEW OF THE STAFFING AND FINANCING OF THESE STATE AGENCIES.

<sup>84</sup>GELLHORN'S CONGRESSIONAL STUDY INDICATES THAT MOST OF THE CASEWORK IS REQUESTS FOR PREFERMENT, OR INFORMATION. THIS WORK WOULD CONTINUE TO BE THE LEGISLATORS'. WHEN AMERICANS COMPLAIN, P. 64.

REFUSAL TO ENACT NEW REFORMS WHICH MAY REDUCE THE PRESENT LEGISLATIVE BURDEN. NOR SHOULD IT LEAD THE LEGISLATURE TO HAMSTRING AN OMBUDSMAN BY RESTRICTING HIS WORK TO LEGISLATIVE REFERRALS. THE NEW INSTITUTION CAN BECOME AN EXTREMELY USEFUL TOOL TO THE LEGISLATIVE BRANCH OF GOVERNMENT, SERVING IT IN A COMPLEMENTARY AND SUPPLEMENTARY MANNER.

SUBSECTION B: ADMINISTRATIVE REVIEW FUNCTIONS OF THE STATE AUDITOR

ONE OF THE CLOSEST INSTITUTIONAL PARALLELS TO THE OMBUDSMAN IS THE LEGISLATIVE AUDITOR. HE IS AN INDEPENDENT OFFICER APPOINTED TO INVESTIGATE INDIVIDUAL AGENCIES AND TO REPORT TO THE LEGISLATURE ON AGENCY ADMINISTRATIVE PROCEDURES AND PRACTICES.<sup>85</sup> AT THE FEDERAL LEVEL THE COMPTROLLER GENERAL OF THE GENERAL ACCOUNTING OFFICE PERFORMS THIS AUDIT FUNCTION.<sup>86</sup> HE IS DIRECTED BY LAW TO

INVESTIGATE ... ALL MATTERS RELATING TO THE RECEIPT, DISBURSEMENT AND APPLICATION OF PUBLIC FUNDS ... AND SHALL MAKE ... TO CONGRESS AT THE BEGINNING OF EACH REGULAR SESSION, A REPORT IN WRITING OF THE WORK OF THE GENERAL ACCOUNTING OFFICE.... IN SUCH REGULAR REPORT, OR IN SPECIAL REPORTS AT ANY TIME WHEN CONGRESS IS IN SESSION, HE SHALL MAKE RECOMMENDATIONS LOOKING TO GREATER ECONOMY OR EFFICIENCY IN PUBLIC EXPENDITURES.<sup>87</sup>

THUS THE COMPTROLLER-GENERAL'S OFFICE COMBINES BROAD POWERS OF INVESTIGATION WITH A MANDATE TO RECOMMEND APPROPRIATE PROCEDURAL CHANGES. THOUGH THE THRUST OF THIS LEGISLATIVE

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<sup>85</sup>ROWAT, "THE SPREAD OF THE OMBUDSMAN IDEA," P. 32.

<sup>86</sup>FEDERAL CODE ANNOTATED, SECTION 31, 42.

<sup>87</sup>FEDERAL CODE ANNOTATED, SECTION 31, 53.

DIRECTIVE IS FINANCIAL, MANY PRACTICES OR PROCEDURES WOULD BE WITHIN THE LANGUAGE OF "EFFICIENCY AND ECONOMY."

AT THE STATE LEVEL MOST STATE GOVERNMENTS HAVE A STATE AUDITOR PROVIDED FOR IN THEIR CONSTITUTION.<sup>88</sup> IN MASSACHUSETTS THE AUDITOR IS REQUIRED BY LAW TO "CAREFULLY" PERFORM AN "ANNUAL" AUDIT OF "ALL DEPARTMENTS, OFFICES, COMMISSIONS, INSTITUTIONS, AND ACTIVITIES OF THE COMMONWEALTH INCLUDING THOSE OF DISTRICTS AND OF AUTHORITIES CREATED BY THE GENERAL COURT."<sup>89</sup> THE AUDITOR IN THE COMMONWEALTH ACTUALLY HAS A POST-AUDIT FUNCTION, WHICH IS CONCERNED PRIMARILY WITH BUDGETARY AND FISCAL CONTROL OF ADMINISTRATIVE PRACTICE AND PROCEDURE. HE REPORTS ON THE RECEIPTS AND DISBURSEMENTS OF THE AGENCY AND THE SALARY OF PERSONNEL, AS WELL AS OTHER BUDGET MATTERS.<sup>90</sup> MORE IMPORTANTLY, HE MAY SUGGEST CHANGES IN THE ADMINISTRATIVE OR ACCOUNTING PROCEDURES OF STATE AGENCIES, SUCH CHANGES BEING DESIGNED TO IMPROVE THE AGENCIES' OPERATING EFFICIENCY.<sup>91</sup> STATE AUDITORS HAVE A BROAD MANDATE FOR THE INVESTIGATION OF THE EXECUTIVE, AND THE FUNCTIONS OF THE OMBUDSMAN ARE DIRECTLY RELATED TO THIS INSTITUTION IN SO FAR AS THEY ARE CONCERNED WITH IMPROVING ADMINISTRATIVE PRACTICES.

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<sup>88</sup>COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES (CHICAGO, 1968), PP. 134-135.

<sup>89</sup>MASSACHUSETTS GENERAL LAWS, CHAPTER 11, SECTION 12.

<sup>90</sup>SEE FOR EXAMPLE "REPORT ON THE ADMINISTRATION SECTION OF THE DEPARTMENT OF PUBLIC UTILITIES" (MAY 1967-JUNE 1968), BUCZKO-STATE AUDITOR.

<sup>91</sup>"REPORT ON THE ADMINISTRATION SECTION OF THE DEPARTMENT OF PUBLIC UTILITIES," P. 3.



HOWEVER, THE AUDITOR IN MASSACHUSETTS AND ELSEWHERE IS ORIENTED TOWARD FISCAL IRREGULARITIES AND IS OVERBURDENED IN THIS AREA ALONE. AN OMBUDSMAN WOULD ONCE AGAIN SERVE IN A COMPLEMENTARY CAPACITY IN RELATION TO THIS INSTITUTION. EXPANDING THE STAFF AND FACILITIES OF THE OFFICE OF AUDITOR TO HANDLE CITIZEN GRIEVANCES MIGHT DETRACT FROM HIS FISCAL REVIEW FUNCTIONS. THESE FUNCTIONS ARE IMPORTANT TO STATE GOVERNMENT AND CANNOT BE MADE SECONDARY TO ANY OTHER ADMINISTRATIVE REVIEW FUNCTION.

#### SUBSECTION C: INFORMAL GRIEVANCE HANDLING

RECENTLY MANY CITIES ACROSS THE COUNTRY HAVE SEEN THE DEVELOPMENT OF GRIEVANCE COLUMNS IN THEIR LOCAL NEWSPAPERS. THIS BEGAN IN HOUSTON IN 1961 WHEN THE CHRONICLE ESTABLISHED SUCH A COLUMN AND FOUND IT SUPRISINGLY SUCCESSFUL.<sup>92</sup> IN ST. LOUIS A GRIEVANCE COLUMN WAS ESTABLISHED BY THE GLOBE DEMOCRAT AND RECEIVED SO MANY CASES THAT IT DROPPED THE ITEM, AND IT WAS ONLY RECENTLY REVIVED IN THE ST. LOUIS SENTINEL, A WEEKLY PAPER.<sup>93</sup> THERE THE COLUMN IS CALLED AID-A-NABOR AND IS BY FAR THE MOST SUCCESSFUL FEATURE OF THE FLEGLING NEWSPAPER ACCORDING TO ITS EDITOR AND PUBLISHER, HOWARD B. WOODS. IN TESTIMONY BEFORE A SENATE SUBCOMMITTEE INVESTIGATING THE OMBUDSMAN, HE NOTED THAT "IT IS APPARENT TO

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<sup>92</sup>ANGUS AND KAPLAN, P.123.

<sup>93</sup>U.S. CONGRESS, SENATE, SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, "TO ESTABLISH A TWO YEAR STUDY OF THE ADMINISTRATIVE OMBUDSMAN," 90TH CONGRESS, 2ND SESSION, 1968.

US AT THE SENTINEL THAT WE WERE WISE IN OUR JUDGMENT. ALREADY THE AID-A-NABOR COLUMN HAS DRAWN MORE MAIL THAN ANY SINGLE FEATURE IN THE NEWSPAPER . . . . MANY OF THE LETTERS ARE SEEKING ASSISTANCE IN HOW TO COPE WITH GOVERNMENT - CITY, STATE, AND FEDERAL."<sup>94</sup> IN BUFFALO BOTH THE COURIER EXPRESS AND THE EVENING NEWS ANSWER WRITTEN REQUESTS FOR INFORMATION AND ASSISTANCE SENT TO THEIR GRIEVANCE COLUMNS. A SURVEY OF LETTERS SENT TO ONE OF THESE FEATURES IN THE FIRST SIX MONTHS OF ITS OPERATION INDICATES THAT THEY DEAL PRIMARILY WITH GOVERNMENT, NOTABLY LOCAL GOVERNMENT SERVICES.<sup>95</sup> THE EXTENSIVE USE OF THESE COLUMNS BY OUR CITIZENRY AND THEIR POPULARITY WITH THE READING PUBLIC INDICATES A NEED FOR AN OMBUDSMAN.

IN BUFFALO AND IN SWEDEN, WHERE AN OMBUDSMAN AND AN ACTIVE PRESS EXIST SIDE BY SIDE, THEY HAVE WORKED CLOSELY TOGETHER.<sup>96</sup> NEWSPAPERS ARE UNABLE TO REQUIRE GOVERNMENT COOPERATION, SINCE THEY HAVE NO LEGAL AUTHORITY TO INVESTIGATE CITIZENS' COMPLAINTS. THE EXISTENCE OF A LOCAL OR STATE OMBUDSMAN MAY, IN SOME INSTANCES, CAUSE THE DISCONTINUANCE OF THESE GRIEVANCE COLUMNS, SINCE HE WOULD BE ABLE TO BE MORE EFFECTIVE, THEORETICALLY AT LEAST. HOWEVER, THIS DOES NOT MEAN THAT THE PRESS WOULD NOT CONTINUE TO COVER THE OMBUDSMAN'S ACTIVITY.<sup>97</sup> THEY WOULD PUBLICIZE HIS CRITIQUE OF VARIOUS

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<sup>94</sup>"ESTABLISH TWO YEAR STUDY OF ADMINISTRATIVE OMBUDSMAN," SEE ALSO APPENDIX E.

<sup>95</sup>SEE APPENDIX FOR LIST OF COMPLAINTS BY TYPE AND NUMBER.

<sup>96</sup>GELLHORN, OMBUDSMAN AND OTHERS, P.227.

<sup>97</sup>GELLHORN, OMBUDSMAN AND OTHERS, P.228-229.

ADMINISTRATIVE PRACTICES; INDEED, PUBLIC OPINION IS THE OMBUDSMAN'S COURT OF LAST RESORT.

SUBSECTION D: INSTITUTIONAL RELATIONSHIPS TO GOVERNMENTAL MODERNIZATION IN MASSACHUSETTS

IN DECEMBER OF 1968 THEN GOVERNOR JOHN VOLPE AND HIS COMMISSIONER OF ADMINISTRATION AND FINANCE, ANTHONY DE FALCO, UNVEILED A PLAN FOR THE MODERNIZATION OF GOVERNMENT IN MASSACHUSETTS.<sup>98</sup> FINANCED BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND PREPARED BY THE OFFICE OF PLANNING AND PROGRAM COORDINATION, THE STUDY PROPOSED A REGROUPING OF STATE AGENCIES INTO TWELVE DEPARTMENTS WHICH WOULD ALLOW FOR EFFECTIVE POLICY CONTROL BY THE GOVERNOR AND IMPROVED DELIVERY OF GOVERNMENTAL SERVICES.<sup>99</sup>

HOW WOULD AN OMBUDSMAN RELATE TO THIS EFFORT? IN LIGHT OF THE FACT THAT MANY OF THE PROBLEMS OF STATE ADMINISTRATION CAN BE TRACED TO THE PROLIFERATION OF AGENCIES, WOULD IT NOT BE BETTER TO PLACE THE AGENCY WITHIN THE PROPOSED STRUCTURE? MORE SPECIFICALLY, HOW DOES THE OMBUDSMAN RELATE TO THE NEW OFFICE OF ADMINISTRATION AND TO ITS DUTY TO SUPERVISE AND REGULATE ADMINISTRATIVE PRACTICES?

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<sup>98</sup>STATE OFFICE OF PLANNING AND PROGRAM COORDINATION, "MODERNIZATION OF THE GOVERNMENT OF THE COMMONWEALTH OF MASSACHUSETTS," (DECEMBER, 1968)

<sup>99</sup>"MODERNIZATION OF THE GOVERNMENT OF MASSACHUSETTS, P.15.

FIRST, LET US NOTE THAT THE OMBUDSMAN IS ORDINARILY A CREATURE OF THE LEGISLATIVE RATHER THAN THE EXECUTIVE BRANCH OF GOVERNMENT.<sup>100</sup> HOWEVER THE DEFINITION OF WHAT THE OFFICE MOST OFTEN "IS" IS NOT AS IMPORTANT AS A DECISION ON WHAT IT OUGHT TO BE. THE QUESTION IS WHAT PLACEMENT MAKES THE BEST SENSE?

WE CANNOT SAY THAT THE ESTABLISHMENT OF SUCH AN OMBUDSMAN IN THE EXECUTIVE BRANCH WOULD RENDER THE INSTRUMENTALITY IMPOTENT. NOR, IN THE SAME VEIN, IS IT UNREASONABLE TO RELY ON THE OFFICE OF ADMINISTRATION TO POLICE AGENCY PROCEDURAL PRACTICES. HOWEVER, WE SHOULD NOTE THE LIMITATIONS OF SUCH AN APPROACH.

IT WOULD BE DIFFICULT FOR THE HEAD OF ONE AGENCY, EVEN THE NEW SECRETARY OF ADMINISTRATION, TO PUBLICLY EXPOSE IRREGULARITIES IN THE OPERATIONS OF A SISTER DEPARTMENT. SECONDLY, WE MIGHT ASSUME THAT THE SECRETARY, IF ASSIGNED RESPONSIBILITY FOR THE PROCESSING OF CITIZEN GRIEVANCES, WOULD BE SUBJECT TO PRESSURE TO MODIFY HIS FINDINGS WHEN IT WAS POLITICALLY EXPEDIENT TO DO SO. THIS PRESSURE MIGHT ORIGINATE WITH THE CHIEF EXECUTIVE OR OTHER STATE AGENCIES. EVEN IF HE RESISTED THIS PRESSURE IN THE MOST STALWART MANNER, MANY CITIZENS WOULD BELIEVE THAT THE SYSTEM WAS LESS THAN PURE AND NOT DESIGNED TO GIVE THEIR COMPLAINTS AN ADEQUATE HEARING. THESE INDIVIDUALS MIGHT DECLINE TO TENDER THEIR GRIEVANCES.

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<sup>100</sup>"MODERNIZATION OF THE GOVERNMENT OF MASSACHUSETTS," P.24.

THE PROPOSED OFFICE OF ADMINISTRATION WOULD CERTAINLY PROVIDE AN EXCELLENT PROCEDURAL REGULATORY MECHANISM. AS AN ANALOGY, IT IS EQUALLY TRUE THAT WHILE EXECUTIVE BUDGET CONTROLS WORK, AN INDEPENDENT AUDIT IS ALSO DESIRABLE. SUCH DUAL CONTROL DEVICES ARE COMMON IN BOTH BUSINESS AND GOVERNMENT. SHOULD WE NOT ALSO HAVE AN INDEPENDENT EVALUATION OF ADMINISTRATIVE PROCEDURES AS THEY AFFECT THE CITIZENS OF THIS COMMONWEALTH? THE LEGISLATURE SHOULD HAVE SUCH A DEVICE RESPONSIBLE TO IT AND NOT TO THE EXECUTIVE.

COULD THE OFFICE OF CONSUMER AFFAIRS FUNCTION AS A REPRESENTATIVE OF THE CONSUMER OF GOVERNMENT SERVICES?<sup>101</sup> THE PROPOSED OFFICE OF CONSUMER AFFAIRS IS DESIGNED TO REGULATE PRIVATE INDUSTRY TO INSURE THE CONSUMERS OF THE COMMONWEALTH FAIR DEALING AND PRACTICES. IT WILL POSSESS A BROAD RANGE OF REGULATORY POWERS, WHICH WILL ALLOW IT TO CONTROL ABUSIVE PRACTICES. IN ITS IDEAL FORM IT MIGHT HAVE A LARGE NUMBER OF REGIONAL AND EVEN NEIGHBORHOOD OFFICES.<sup>102</sup> THERE CAN BE NO DOUBT THAT SHOULD MODERNIZATION BE ADOPTED AND SHOULD AN OMBUDSMAN BE ESTABLISHED, THE AGENCIES WOULD WORK IN TANDEM IN MANY AREAS. HOPEFULLY, COOPERATION WOULD BE A BYWORD OF THE

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<sup>101</sup> A DESCRIPTION OF THE OFFICE OF CONSUMER AFFAIRS DECLARES ITS MISSION TO BE: "TO PROTECT AND ENHANCE THE CONSUMER'S OPTIONS IN THE WAY HE SPENDS HIS MONEY FOR GOODS AND SERVICES...." THE MISSION IS TO BE ACCOMPLISHED THROUGH A COMPREHENSIVE REGULATORY SCHEME WHICH WILL CONTROL LEGAL MONOPOLIES, PREVENT FRAUDULENT PRACTICES AND SUPERVISE CERTAIN PRICE FIXING MECHANISMS. "MODERNIZATION OF THE GOVERNMENT OF MASSACHUSETTS," P.24.

<sup>102</sup> SOME EXPERTS ENVISION SUCH OFFICES CONVENIENTLY LOCATED IN EVERY AREA OF THE STATE, WITH A SUFFICIENT STAFF TO INSURE PROMPT RESPONSE TO COMPLAINTS. STAFF DISCUSSIONS, OFFICE OF PLANNING AND PROGRAM COORDINATION (JANUARY 1969).

RELATIONSHIP. HOWEVER, IN ORDER TO DEVELOP A MORE COMPLETE SYSTEM FOR REDRESS OF GRIEVANCES, THE OMBUDSMAN MUST REMAIN FREE TO CRITICIZE ALL EXECUTIVE GOVERNMENTAL OPERATIONS, INCLUDING THE OFFICE OF CONSUMER AFFAIRS.

SUBSECTION E: THE TOTALITY OF INSTITUTIONAL RELATIONSHIPS:  
THE OMBUDSMAN AND GOVERNMENT

WHAT IS HAPPENING TO GOVERNMENT TODAY? MANY POLITICAL SCIENTISTS SAY THAT THERE IS A GROWING GAP BETWEEN THE AMERICAN CITIZEN AND HIS GOVERNMENT.<sup>103</sup> FOLLOWING ARE SOME OF THE SYMPTOMS OF THIS SOCIO-POLITICAL MALADY:

(1) THE CONSUMER OF GOVERNMENT SERVICES IS CONFUSED BY THE COMPLEXITY OF THE ADMINISTRATIVE MECHANISMS NEEDED TO RUN A MODERN GOVERNMENT. HE HAS DIFFICULTY UNDERSTANDING THE MAZE OF INTERGOVERNMENTAL RELATIONSHIPS AND INTERAGENCY TIES THAT ARE FOUND IN MANY PROGRAMS.

(2) HE FEELS REMOTE FROM GOVERNMENT, ALIENATED BY A BUREAUCRACY HE CANNOT COME TO KNOW PERSONALLY OR DEAL WITH INDIVIDUALLY.

(3) INDIVIDUALS ARE UNDER-REPRESENTED IN A STRUCTURE WHICH IS PRIMARILY DESIGNED FOR INTEREST GROUP PARTICIPATION IN ITS ACTIVITIES.

(4) CITIZENS LACKING THE TIME, MONEY OR KNOWLEDGE ARE UNABLE TO REGISTER THEIR GRIEVANCES UNDER THE PRESENT SYSTEM.

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<sup>103</sup>D. NELSON AND E. PRICE, "REALIGNMENT, READJUSTMENT, REFORM: THE IMPACT OF THE OMBUDSMAN ON AMERICAN CONSTITUTIONAL AND POLITICAL INSTITUTIONS," THE ANNALS, P. 128. (HEREAFTER CITED AS NELSON.)

(5) CIVIL SERVANTS ARE, IN CERTAIN CIRCUMSTANCES, OVERLY DEFENSIVE AND EVEN OCCASIONALLY OVERBEARING IN THEIR ATTEMPTS TO STIFLE GRIEVANCES.

(6) FESTERING PROBLEMS OF TAXATION, DISCRIMINATION, CRIME OF DETERIORATION OF THE ENVIRONMENT PRODUCE A CYNICAL VIEW ON THE PART OF CITIZENS TOWARD GOVERNMENTAL ACTIVITY.<sup>104</sup>

ALL OVER THE WORLD THE GROWTH OF POSITIVE GOVERNMENT HAS SURGED UPWARD DURING THE PAST QUARTER CENTURY OR MORE, WITH A CONSEQUENT MULTIPLICATION OF DANGERS FROM IMPROPER USE OF GOVERNMENTAL POWER.<sup>105</sup>

WHAT CAN BE DONE TO AVERT THIS OPPORTUNITY FOR THE ABUSE OF POWER, AND HOW CAN WE INSURE AN ACTIVE AND PROGRESSIVE GOVERNMENT WHICH DOES NOT DISREGARD THE RIGHTS OF THE CITIZENS IT SERVES? IS AN OMBUDSMAN THE ANSWER? WE SHOULD FIRST NOTE THAT GOOD GOVERNMENT DEPENDS ON GOOD PEOPLE.

THE FIRST LINE OF PROTECTION EVERYWHERE LIES IN ATTEMPTS TO PROVIDE ABLE AND CONSCIENTIOUS PERSONNEL STRIVING FOR THE HIGHEST QUALITY OF PERFORMANCE. BUT EXPERIENCE BOTH IN AMERICA AND ELSEWHERE SHOWS THAT ACHIEVEMENT IN THIS RESPECT IS LIKELY TO BE UNEVEN.... THE SECOND LINE OF DEFENSE IS PROCEDURAL SAFEGUARDS. OUR AMERICAN ACHIEVEMENT IN THE DEVELOPMENT AND REFINEMENT OF PROCEDURAL SAFEGUARDS IS A GREAT AND SIGNIFICANT ONE -- PROBABLY BY A WIDE MARGIN THE BEST IN THE WORLD.<sup>106</sup>

THE STRUCTURE OF THE PROCEDURAL SAFEGUARDS AS WELL AS THEIR NUMBER AND VARIETY IS COMMENSURATE WITH THE COMPLEXITY OF THE GOVERNMENTAL MACHINERY WE WISH TO CONTROL. NO SINGLE AGENCY, SCHEME OR DEVICE WILL BE ABLE TO INSURE THE PROTECTION OF THE CITIZEN OR THE EFFICACY OF THE GOVERNMENTAL PROCESS.

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<sup>104</sup>NELSON, PP. 129-130.

<sup>105</sup>K. DAVIS, "OMBUDSMAN IN AMERICA: OFFICERS TO CRITICIZE ADMINISTRATIVE ACTION," UNIVERSITY OF PENNSYLVANIA LAW REVIEW CIX (JUNE 1961), 1057, 1059.

<sup>106</sup>DAVIS. "OMBUDSMAN IN AMERICA..."

WHAT WE MUST ATTEMPT TO DO IS DESIGN AN ENTIRE SYSTEM OF REGULATION AND SUPERVISION WHICH WILL, AT ONE AND THE SAME TIME, IMPROVE THE DELIVERY OF GOVERNMENTAL SERVICES AND PROMOTE THE CONFIDENCE AND PRIDE OF THE PUBLIC SERVANT, WHILE INSURING THE SATISFACTION OF THE INDIVIDUAL RECIPIENT OF GOVERNMENT SERVICES. THIS REQUIRES:

(1) THE IMPROVEMENT AND CLARIFICATION OF ADMINISTRATIVE REGULATORY CODES;

(2) THE STRENGTHENING OF THE REPRESENTATION OF THE GENERAL CONSUMING PUBLIC IN THE ADMINISTRATIVE PROCESS,

(3) REORGANIZATION AND REVITALIZATION OF INTERNAL ADMINISTRATIVE REVIEW SYSTEMS THROUGH THE SIMPLIFICATION OF APPEAL PROCEDURES AND THE IMPROVEMENT OF AGENCY ATTITUDES TOWARD CONSUMER GRIEVANCES;

(4) INCREASED CITIZEN ACCESS TO JUDICIAL REVIEW THROUGH IMPROVED LEGAL AID SERVICES; ALONG WITH SUBSTANTIAL REFORMS DESIGNED TO INCREASE THE SPEED AND EFFICIENCY OF THE JUDICIAL REVIEW PROCESS;

(5) THE ENCOURAGEMENT OF ACTIVE INVOLVEMENT IN CITIZENS' GRIEVANCES BY THE STATE'S AUDITOR, COMPTROLLER, ATTORNEY GENERAL OR GOVERNOR BY PROVIDING ADEQUATE STAFF, FUNDS AND MOTIVATION FOR THE RESOLUTION OF CITIZENS' COMPLAINTS;

(6) INCREASED FLOW OF INFORMATION FROM STATE AGENCIES, ON THEIR FUNCTIONS, PROGRAMS AND PROCEDURES;

(7) STRENGTHENING OF STATE LEGISLATURES BY THE PROVISION OF ADEQUATE STAFF AND FACILITIES TO THE INDIVIDUAL LEGISLATOR AND THE STANDING COMMITTEES.<sup>107</sup>

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<sup>107</sup> THIS GENERAL OUTLINE OF A SUGGESTED SYSTEM OF PROCEDURAL SAFEGUARDS IS DEVELOPED IN GREATER DETAIL IN NELSON, THE ANNALS, PP. 131-136.







## SECTION III

## AN OMBUDSMAN IN MASSACHUSETTS

## SUBSECTION A: THE OMBUDSMAN: A NEW ADMINISTRATIVE CONTROL DEVICE

NO SINGLE CONTROL DEVICE CAN BE TOTALLY RESPONSIBLE FOR INSURING THE EFFICACIOUS AND EQUITABLE FUNCTIONING OF THE ADMINISTRATIVE PROCESS. MANY INSTITUTIONS HAVE A ROLE TO PLAY IN REGULATING GOVERNMENT PROCEDURES AND PRACTICES. IT WAS ALSO NOTED THAT THE ARRAY OF EXISTING INSTITUTIONS ARE NOT ADEQUATE, AND A ROLE EXISTS FOR A NEW CONTROL MECHANISM.

BEFORE PROPOSING LEGISLATION WHICH MIGHT BE USED TO IMPLEMENT SUCH A PROCEDURAL REFORM, LET US DEFINE MORE PRECISELY THE INSTITUTION OF WHICH WE ARE SPEAKING. WHAT DO WE MEAN BY THE TERM "OMBUDSMAN"? WHAT ARE THE FUNCTIONS OF THE OFFICE, AND WHAT ARE THE GOALS IT SEEKS TO ACCOMPLISH?

IN SWEDISH, THE WORD OMBUD MEANS A REPRESENTATIVE, AND THE TERM OMBUDSMAN MAY BE USED TO DESIGNATE A VARIETY OF REPRESENTATIVES INCLUDING LAWYERS, DIPLOMATS, AND LEGISLATORS.<sup>108</sup> THE PARLIAMENTARY AGENT OF JUSTICE, THE RIKSDAGENS JUSTITIEOMBUDSMAN, MAY BE THE OMBUDSMAN, BUT THERE ARE OTHERS.<sup>109</sup> IN INTERNATIONAL PARLANCE, HOWEVER, THE TERM IS USED TO DESIGNATE A SPECIFIC INSTITUTION. I SAY THIS, WHILE RECOGNIZING THAT CERTAIN OFFICIALS MAY BE REFERRED TO BY THAT TITLE WHO DO NOT FIT THE COMMON DEFINITION OF THAT OFFICE.<sup>110</sup>

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<sup>108</sup> ANDERSON, OMBUDSMAN FOR AMERICAN GOVERNMENT?, P. 1.

<sup>109</sup> ANDERSON, OMBUDSMAN FOR AMERICAN GOVERNMENT?. P. 1.

<sup>110</sup> THE TERM "EXECUTIVE OMBUDSMAN" IS PARTICULARLY MISLEADING, SINCE THE OFFICE IS ALMOST ALWAYS VIEWED AS A CREATURE OF THE LEGISLATURE.

A PROFESSOR AT CARLETON UNIVERSITY IN OTTAWA, CANADA,  
HAS SUGGESTED THE FOLLOWING DEFINITION:

HE IS AN INDEPENDENT AND POLITICALLY NEUTRAL  
OFFICER OF THE LEGISLATURE, USUALLY PROVIDED FOR  
IN THE CONSTITUTION, WHO RECEIVES AND INVESTIGATES  
COMPLAINTS FROM THE PUBLIC AGAINST ADMINISTRATIVE  
ACTION, AND WHO HAS THE POWER TO CRITICIZE AND<sup>111</sup>  
PUBLICIZE, BUT NOT TO REVERSE, SUCH ACTION.

WHILE IT SHOULD BE EMPHASIZED THAT A CONSTITUTIONAL BASIS  
IS NOT A NECESSITY, THIS IS A GOOD WORKING DEFINITION OF THE  
INSTITUTION.

TO DEFINE THE INSTITUTION FURTHER, LET US LIST, IN  
A GENERAL WAY, THE ACTIVITIES OF THE OFFICE:<sup>112</sup>

(1) RECEIPT OF COMPLAINTS: THE OMBUDSMAN RECEIVES  
COMPLAINTS FROM INDIVIDUALS WHO BELIEVE THAT THEY HAVE BEEN  
MISTREATED IN THE PUBLIC ADMINISTRATIVE PROCESS.

(2) INITIAL RESPONSE: IF THE OMBUDSMAN BELIEVES THAT  
THE COMPLAINT IS (A) PREMATURE, (B) UNFOUNDED, OR (C) OUTSIDE  
OF HIS JURISDICTION, HE MAY DISMISS THE COMPLAINT WITH AN  
EXPLANATION OF HIS GROUNDS FOR DOING SO.<sup>113</sup>

(3) INVESTIGATION: IF THE COMPLAINT WARRANTS INVES-  
TIGATION, THE OMBUDSMAN MAY REQUEST AN EXPLANATION FROM THE  
APPROPRIATE ADMINISTRATOR OF EXAMINE AGENCY FILES AND HOLD

<sup>111</sup> ROWAT, "THE SPREAD OF THE OMBUDSMAN IDEA", P. 36.

<sup>112</sup> THE LIST OF ACTIVITIES IS TAKEN FROM GWYN, PP.  
39-40.

<sup>113</sup> OF COURSE, THE OFFICE MAY DIRECT THE COMPLAINANT TO  
THE APPROPRIATE AGENCY, IF THE COMPLAINT IS PREMATURE OR OUT  
OF HIS JURISDICTION.

ADMINISTRATIVE HEARINGS.<sup>114</sup>

(4) GENERAL INSPECTION: THE OMBUDSMAN MAY ALSO INVESTIGATE ADMINISTRATIVE PRACTICES AND PROCEDURES WHICH COME TO HIS ATTENTION FROM OTHER SOURCES, SUCH AS INSPECTION OF OPERATING GOVERNMENT AGENCIES.<sup>115</sup>

(5) REMEDIAL ACTION: WHEN AN ADMINISTRATIVE ERROR OR MALPRACTICE IS DISCOVERED, THE OFFICE MAY SUGGEST PROCEDURAL CHANGES TO THE AGENCY ITSELF OR TO OTHER CONTROL MECHANISMS WITHIN THE EXECUTIVE BRANCH. THE OMBUDSMAN MAY PUBLICIZE ERRORS WHICH ARE NOT CORRECTED BY APPROPRIATE EXECUTIVE ACTION. HE MAY SUGGEST SPECIFIC STATUTORY REFORMS TO THE LEGISLATURE, OR HE MAY, IF A VIOLATION OF THE LAW HAS OCCURRED, BRING THE MATTER TO THE ATTENTION OF THE ATTORNEY GENERAL.

IT IS IMPORTANT TO NOTE, HOWEVER, THAT THE OMBUDSMAN CANNOT PROSECUTE ANY INDIVIDUAL ADMINISTRATOR OR COMPEL ANY ADMINISTRATIVE ACTION WHATSOEVER. SUCH CONTROL DEVICES MUST REMAIN WITH OTHER INSTITUTIONS. PRIMARY RELIANCE WILL CONTINUE TO BE PLACED ON EXECUTIVE CONTROL DEVICES OR LEGISLATIVE ACTION.

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<sup>114</sup> IF THE COMPLAINT IS DETERMINED TO BE UNFOUNDED AT ANY STAGE OF THE PROCESS, THE OMBUDSMAN SHOULD EXPLAIN THE ADMINISTRATIVE ACTION AND GIVE THE REASONS FOR ITS VALIDITY TO THE COMPLAINANT. IT IS ONLY BY DOING THIS THAT WE CAN INSURE THE PROTECTION OF THE ADMINISTRATOR FROM UNFOUNDED CRITICISM IN THE FUTURE.

<sup>115</sup> OTHER ADMINISTRATIVE AGENCIES, SUCH AS THE STATE AUDITOR OR THE PROPOSED OFFICE OF ADMINISTRATION WOULD BE PRIMARILY RESPONSIBLE FOR PERIODIC EVALUATIONS OF AGENCY PROCEDURES. IT IS IMPORTANT, HOWEVER, THAT THE OMBUDSMAN BE FREE TO INITIATE HIS OWN INVESTIGATIONS, SHOULD HE BECOME AWARE OF POSSIBLY ERRONEOUS ADMINISTRATIVE ACTIONS.

(6) GENERAL REPORT: IN ADDITION TO ANY SPECIAL REPORTS, THE OFFICE MAY PREPARE AN ANNUAL REPORT WHICH SUGGESTS GENERAL CHANGES IN ADMINISTRATIVE PRACTICE AND PROCEDURE. THIS ANNUAL REPORT IS SUBMITTED TO THE LEGISLATURE.

#### GOALS OF THE OMBUDSMAN

THE OMBUDSMAN ATTEMPTS TO ACCOMPLISH TWO BROAD SOCIAL OBJECTIVES. THE FIRST IS THE IMPROVEMENT OF PUBLIC ADMINISTRATION.<sup>116</sup> THE OFFICE SPURS ADMINISTRATIVE AGENCIES TO SELF-IMPROVEMENT BY ITS MERE EXISTENCE AS WELL AS THROUGH SPECIAL REPORTS. THE ANNUAL REPORT FURTHERS THIS PROGRESS BY POINTING OUT TO THE LEGISLATURE WAYS TO IMPROVE EXISTING ADMINISTRATIVE PRACTICES WHICH ARE UNDESIRABLE. THE INCREASED FAITH OF THE GENERAL PUBLIC IN THE ADMINISTRATIVE PROCESS MAKES GOVERNMENT RUN SMOOTHER BY PROMOTING A SPIRIT OF ACTIVE COOPERATION. FINALLY, CIVIL SERVANTS, SHIELDED FROM UNWARRANTED ABUSE, HAVE HIGHER MORALE AND TEND TO PERFORM THEIR DUTIES WITH GREATER EFFICIENCY.

THE SECOND GOAL OF THE INSTITUTION IS THE PROTECTION OF INDIVIDUAL CITIZENS.<sup>117</sup> GRIEVANCES AGAINST UNFAIR OR ABUSIVE ADMINISTRATIVE PRACTICES ARE REDRESSED. NOT ONLY THE INDIVIDUAL COMPLAINANT BUT SOCIETY AS A WHOLE BENEFITS FROM THE CORRECTION OF SUCH ABUSES OF POWER, SINCE THE GOVERNMENTAL PROCESS IS IMPROVED. MOREOVER, CITIZENS BRINGING

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<sup>116</sup>GWYN, P. 41-42.

<sup>117</sup>GWYN, P. 42-43.

SUCH COMPLAINTS LEARN TO HAVE A MORE EFFECTIVE RELATIONSHIP WITH OTHER STATE AGENCIES THROUGH A BETTER KNOWLEDGE OF THEIR PROCEDURES. AND THE APPREHENSION OF CITIZENS WHO MUST FACE A BEWILDERINGLY COMPLEX PUBLIC ADMINISTRATION IS GREATLY REDUCED.

YARDSTICKS FOR MEASURING THE INSTITUTION

IN 1968 THE KERNER COMMISSION REPORT DECLARED:

WE ARE CONVINCED, ON THE RECORD BEFORE THE COMMISSION, THAT THE FRUSTRATION REFLECTED IN THE RECENT DISORDERS RESULTS, IN PART AT LEAST, FROM THE LACK OF ACCESSIBLE AND VISIBLE MEANS OF ESTABLISHING THE MERITS OF GRIEVANCES AGAINST THE AGENCIES OF LOCAL AND STATE GOVERNMENT, INCLUDING<sup>118</sup> BUT NOT LIMITED TO THE POLICE.

THE COMMISSION NOTED THAT THROUGHOUT THE COUNTRY VARIOUS ADMINISTRATIVE CONTROL DEVICES HAD BEEN PROPOSED. IT DID NOT RECOMMEND ANY PARTICULAR SOLUTION OR SPECIFIC FORM OF THE INSTITUTION. HOWEVER, THE REPORT DID SUGGEST THAT THE FOLLOWING CRITERIA BE MET:

(1) INDEPENDENCE SHOULD BE ASSURED BY SEPARATION FROM EXISTING AGENCIES AND BY EITHER LEGISLATIVE APPOINTMENT OR EXECUTIVE APPOINTMENT FOR AN EXTENDED TERM WITH REMOVAL IN THE HANDS OF THE LEGISLATURE.

(2) ADEQUATE STAFF AND FUNDING IS REQUIRED IF THE RESPONSIBILITIES OF THE AGENCY ARE TO BE DISCHARGED AND THE FULL OPERATIONAL COSTS ADEQUATELY MET.

(3) GENERAL JURISDICTION SHOULD BE PROVIDED SO THAT THE

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<sup>118</sup> REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS (NEW YORK, 1968), P. 291.

AGENCY CAN BE FREE TO OPERATE IN AS MANY AREAS AS PRACTICAL.

(4) ADEQUATE POWERS TO SUBPOENA WITNESSES AND DOCUMENTS, HOLD HEARINGS AND SUGGEST REMEDIAL ACTION MUST BE GIVEN TO THE AGENCY.

(5) ACCESS TO THE GRIEVANCE MECHANISM MUST BE FREE AND UNRESTRICTED; AS MANY OFFICERS AS PRACTICAL SHOULD BE OPENED.

(6) PARTICIPATION OF THE COMPLAINANT IN THE GRIEVANCE PROCESS IS DESIRABLE TO INSURE HIS SATISFACTION WITH THE PROCEDURE.<sup>119</sup>

#### A REMINDER OF THE LIMITATIONS OF THE INSTITUTION

ONE OF THE LEADING PROPONENTS OF THE OMBUDSMAN IN AMERICA IS PROFESSOR STANLEY V. ANDERSON, WHO HAS SAID THAT "AMONG THE OMBUDSMAN'S WORST ENEMIES ARE SOME OF HIS BEST FRIENDS: THOSE WHO EXPECT TOO MUCH OF HIM."<sup>120</sup> THOSE WHO ARE FAMILIAR WITH GOVERNMENT KNOW THAT NO REFORM IS A PANACEA. THE OMBUDSMAN CAN IMPROVE THE OPERATION OF A BASICALLY SOUND AND HONEST ADMINISTRATION BUT CANNOT RIGHT ALL THE WRONGS OF OUR CONTEMPORARY SOCIETY. HE CAN INSURE MODEST PROGRESS, BUT NOT RADICAL REFORM.<sup>121</sup>

THE OMBUDSMAN, AS AN EXTERNAL CRITIC OF PUBLIC ADMINISTRATION, WILL NOT BE A PATHFINDER BLAZING TRAILS TO MAJOR

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<sup>119</sup> REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, P. 292. SINCE THE AUTHOR'S REMARKS ARE AN ABBREVIATION OF THE TEXT WHICH MAY HAVE BROADER IMPLICATIONS, THE ENTIRE RECOMMENDATION IS REPRINTED IN APPENDIX D .

<sup>120</sup> ANDERSON, "POLITICS AND PROPOSALS," P. 155.

<sup>121</sup> "POLITICS AND PROPOSALS," P. 155-58.



PROCEDURAL INNOVATIONS. RATHER, HE WILL BE A COMMENTATOR ON ADMINISTRATIVE PRACTICES, AN ADVISOR TO THOSE WHO WISH REFORM.<sup>122</sup> IF HE IS TO FUNCTION EFFICIENTLY, HE CANNOT BE CONSTANTLY CHALLENGING THE SYSTEM. HE MUST BE PATIENT AND FRIENDLY, ALBEIT FIRM AND PERSISTENT, AND MUST WIN THE RESPECT OF THOSE HE WORKS WITH.<sup>123</sup>

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<sup>122</sup>WHEN AMERICANS COMPLAIN, P. 225.

<sup>123</sup>WHEN AMERICANS COMPLAIN, P. 229-30.

SUBSECTION B:

STATUTORY PROPOSAL  
FOR THE  
COMMONWEALTH OF MASSACHUSETTS

THE FOLLOWING PROPOSED LEGISLATION IS BASED ON A MODEL OMBUDSMAN STATUTE PREPARED BY WALTER GELLHORN AND THE HAWAIIAN OMBUDSMAN ACT (AND TO SOME DEGREE THE OMBUDSMAN PROPOSAL OF REPRESENTATIVE JAMES NOLEN). THE COMMENTARY RELIES HEAVILY ON THE ANNOTATIONS FOUND IN GELLHORN'S MODEL BILL AS WELL AS STAFF DISCUSSIONS OF THE OFFICE OF PLANNING AND PROGRAM COORDINATION, STATE OFFICE OF ADMINISTRATION AND FINANCE. THE DISCUSSIONS WERE A RESPONSE TO THE QUESTIONNAIRE FOUND IN APPENDIX F. THEY WERE NOT, HOWEVER, LIMITED TO THE ISSUES RAISED THEREIN.

THE AUTHOR HAS MADE A GENUINE EFFORT TO INCLUDE ALL POINTS OF VIEW THAT WERE EXPRESSED DURING STAFF DISCUSSIONS IN THE COMMENTARY. IN ADDITION THE NOTE FOLLOWING THE COMMENTARY STATES THE VIEW OF THOSE PERSONS IN THE OFFICE OF PLANNING AND PROGRAM COORDINATION (OPPC) WHO DID NOT AGREE WITH THE CONCEPT ITSELF OR WHO, FOR VARIOUS REASONS, OPPOSED THE MANNER, TIMING, OR SPECIFIC PROVISION OF THE LEGISLATION.

## THE COMMONWEALTH OF MASSACHUSETTS

IN THE YEAR ONE THOUSAND NINE HUNDRED AND SIXTY-NINE

## AN ACT

CREATING THE OFFICE OF OMBUDSMAN IN THE COMMONWEALTH  
OF MASSACHUSETTS.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES IN  
GENERAL COURT ASSEMBLED, AND BY THE AUTHORITY OF THE SAME  
AS FOLLOWS:

## SECTION 1. DEFINITIONS. AS USED IN THIS ACT, THE TERM

(A) "ADMINISTRATIVE AGENCY" MEANS ANY DEPARTMENT OR OTHER  
GOVERNMENTAL UNIT, ANY OFFICIAL, OR ANY EMPLOYEE OF THE  
COMMONWEALTH OF MASSACHUSETTS; BUT DOES NOT INCLUDE

- (1) ANY COURT OR JUDGE OR APPURTENANT JUDICIAL STAFF,
- (2) THE GENERAL COURT, ITS COMMITTEES, AND ITS STAFF,
- (3) THE GOVERNOR, THE LIEUTENANT GOVERNOR, THE ATTORNEY  
GENERAL, THE SECRETARY, THE TREASURER, THE STATE AUDITOR,  
AND THEIR PERSONAL STAFFS,
- (4) AN ENTITY OF THE FEDERAL GOVERNMENT,
- (5) A MULTI-STATE GOVERNMENTAL ENTITY,
- (6) ANY INSTRUMENTALITY OF ANY POLITICAL SUBDIVISION  
OF THE STATE,
- (7) ANY OFFICER OR EMPLOYEE OF THE STATE POLICE.

COMMENT: TRADITIONALLY THE COURTS ARE IMMUNE FROM EXTRA-JUDICIAL SCRUTINY OR INTERFERENCE. THE APPELLATE MACHINERY IS DESIGNED SPECIFICALLY TO INSURE FAIRNESS AT EVERY STAGE OF THE LEGAL PROCESS. LEGISLATORS AND THE COMMITTEES AND STAFF OF THE LEGISLATURE ARE THE BASIC LAW-MAKING AND REGULATORY BODY IN OUR POLITICAL SYSTEM AND SHOULD NOT BE SUBJECT TO SUCH A REVIEW PROCESS. IN ADDITION THEY, AS WELL AS THE GOVERNOR AND OTHER CONSTITUTIONAL OFFICERS, ARE DIRECTLY ANSWERABLE TO THE ELECTORATE, THEIR CONDUCT IN OFFICE AND ARE SUBJECT TO CONSTANT POLITICAL EXAMINATION. THOUGH SPECIFIC REFERENCE TO THE EXCLUSION OF ENTITIES OF THE FEDERAL GOVERNMENT OR MULTI-STATE AGENCIES IS PERHAPS UNNECESSARY, IT DOES SPECIFY THE LIMITATION OF THE OFFICE TO STATE AGENCIES OVER WHICH THE LEGISLATURE MAY EXERCISE CONTROL. THOUGH EVERY PROVISION OF THIS SECTION WAS SUBJECT TO SOME DISAGREEMENT, THE FINAL TWO EXCLUSIONS UNDER SUB-SECTIONS 6 AND 7 OF 2(A) CAUSED THE MOST CONFLICT. THOSE WHO ARGUED FOR THEIR EXCLUSION DECLARED THAT LOCAL GOVERNMENT SHOULD NOT HAVE SUCH A SYSTEM IMPOSED ON IT BY THE STATE. LOCAL GOVERNMENTS SHOULD BE PERMITTED TO ESTABLISH THEIR OWN GRIEVANCE PROCEDURES, TAILORED TO LOCAL CONDITIONS AND COORDINATED WITH THE STATE OMBUDSMAN. IT WAS POINTED OUT, HOWEVER, THAT A CITIZEN UNDER THIS SYSTEM MAY HAVE DIFFICULTY IN ASCERTAINING THE CORRECT OFFICE, LOCAL OR STATE, TO REGISTER A GRIEVANCE WHEN HE IS NOT SURE OF THE JURISDICTIONAL LIMITATIONS INVOLVED. THE EXCLUSION OF THE POLICE WAS OPPOSED ON THE GROUND THAT NO FUNCTIONAL DIFFERENCE BETWEEN THAT AND ANY OTHER DEPARTMENT COULD BE SHOWN. THE EXCLUSION WAS BASED ON A BELIEF THAT THE OMBUDSMAN WOULD REQUIRE PUBLIC TRUST AND CONFIDENCE TO PERFORM HIS FUNCTIONS, AND THE INCLUSION OF THE POLICE IN THE PRESENT POLITICAL ATMOSPHERE MAY ADVERSELY AFFECT THIS PUBLIC CONFIDENCE. DESPITE THE OPINIONS OF THE MAJORITY OF THE STAFF, THE AUTHOR AGREES WITH THE LATTER ARGUMENT AND HAS THUS EXCLUDED THE POLICE.

(B) "ADMINISTRATIVE ACT" INCLUDES ANY ACTION, OMISSION, DECISION, RECOMMENDATION, PRACTICE OR PROCEDURE, BUT DOES NOT INCLUDE THE PREPARATION OR PRESENTATION OF LEGISLATION.

COMMENT: THE LATTER PART OF THE SECTION EXCLUDING THE PREPARATION OR PRESENTATION OF LEGISLATION WAS WRITTEN AS ANOTHER DEVICE TO PROTECT THE INTEGRITY OF THE LEGISLATIVE PROCESS.

SECTION 2. ESTABLISHMENT. THE OFFICE OF OMBUDSMAN IS HEREBY ESTABLISHED AS AN INDEPENDENT AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMENT: DISCUSSION OF THE REASONS FOR THE INDEPENDENCE OF THE AGENCY WILL FOLLOW IN THE SECTION ON APPOINTMENT (SECTION 3). WE ARE HERE LAYING THE FIRM THEORETICAL FOUNDATION OF INDEPENDENCE, THOUGH OBVIOUSLY THE ACTUAL EXTENT OF INDEPENDENCE IS DETERMINED BY THE PROVISIONS FOR APPOINTMENT AND REMOVAL.

SECTION 3. APPOINTMENT. A COMMITTEE APPOINTED BY THE GOVERNOR, COMPOSED OF FIVE PERSONS, NO MORE THAN THREE OF WHOM ARE AFFILIATED WITH THE SAME POLITICAL PARTY, SHALL NOMINATE AN OMBUDSMAN. THIS OFFICER OF THE GENERAL COURT SHALL THEN BE APPOINTED BY MAJORITY VOTE OF EACH HOUSE.

COMMENT: THIS PROVISION IS CONTRARY TO BOTH THE GELLHORN MODEL, WHICH CALLS FOR EXECUTIVE APPOINTMENT, AND THE HAWAIIAN ACT, WHICH PROVIDES FOR APPOINTMENT BY THE LEGISLATURE. IT HAS BEEN ARGUED THAT AN EXECUTIVE APPOINTEE WILL FIND IT DIFFICULT TO CRITICIZE ANY ACTION OF THE EXECUTIVE BRANCH OF GOVERNMENT. IT HAS ALSO BEEN CONTENDED THAT THE EXECUTIVE IS THE TRADITIONAL APPOINTING POWER IN AMERICA. THE COMMITTEE APPOINTMENT METHOD WAS SUGGESTED BY SEVERAL MEMBERS OF THE OPPC STAFF. IT HAS THE ADVANTAGE OF AVOIDING DIRECT EXECUTIVE APPOINTMENT AND DEPENDENCE, WHILE RETAINING A SUBSTANTIAL ROLE FOR THE LEGISLATURE.

SECTION 4. QUALIFICATIONS. NO PERSON MAY SERVE AS OMBUDSMAN WITHIN TWO YEARS OF THE LAST DAY ON WHICH HE SERVED AS A MEMBER OF THE LEGISLATURE, OR WHILE HE IS A CANDIDATE FOR OR HOLDS ANY OTHER STATE OR LOCAL OFFICE, EXCEPT A JUDICIAL OFFICE, OR WHILE HE IS ENGAGED IN ANY OTHER OCCUPATION FOR REWARD OR PROFIT.

COMMENT: WALTER GELLHORN FEELS THAT ANY PRONOUNCEMENT ON QUALIFICATIONS IS EITHER SUPERFLUOUS OR UNDULY RESTRICTING. HE SIMPLY SAYS THAT THE OMBUDSMAN SHOULD BE EQUIPPED TO HANDLE CERTAIN PROBLEMS AND SHOULD NOT BE ACTIVELY INVOLVED IN PARTISAN AFFAIRS. THE ABOVE SECTION IS MORE SPECIFIC AND WILL PROVIDE, IT IS BELIEVED, A GREATER INSULATION OF THE OFFICE FROM THE POLITICAL ARENA. THE AUTHOR HAS ADDED AN INJUNCTION AGAINST LOCAL OFFICEHOLDERS AND HAS EXEMPTED THE JUDICIARY IN THE BELIEF THAT THE FORMER INCREASES POLITICAL INSULATION AND THE LATTER INCREASES THE FIELD OF CANDIDATES WHILE NOT SEVERELY AFFECTING THAT PRINCIPLE.

SECTION 5. TERM OF OFFICE. (A) THE OMBUDSMAN SHALL SERVE FOR A TERM OF SIX YEARS, UNLESS REMOVED BY A VOTE OF TWO-THIRDS OF THE MEMBERS OF THE SENATE UPON THEIR DETERMINING THAT HE HAS BECOME INCAPACITATED OR HAS BEEN GUILTY OF NEGLECT OF DUTY OR MISCONDUCT; (B) IF THE OFFICE OF OMBUDSMAN BECOMES VACANT FOR ANY CAUSE, THE DEPUTY OMBUDSMAN SHALL SERVE AS ACTING OMBUDSMAN UNTIL AN OMBUDSMAN HAS BEEN APPOINTED FOR A FULL TERM.

COMMENT: THE TERM OF OFFICE SHOULD BE LONG ENOUGH TO ALLOW FOR A PERIOD OF OVERLAP BETWEEN GOVERNORS. THE OMBUDSMAN SHOULD BE INSULATED FROM POLITICAL CONSIDERATIONS BUT NOT ISOLATED FROM LEGISLATIVE CONTROL. THE SIX YEAR TERM WAS TAKEN FROM THE HAWAIIAN STATUTE, BUT THE PROVISION FOR REMOVAL BY TWO-THIRDS OF THE SENATE RATHER THAN TWO-THIRDS OF BOTH HOUSES IS DIFFERENT FROM BOTH THE GELLHORN AND THE HAWAIIAN ACT. I BELIEVE IT IS A NEEDLESSLY HIGH MAJORITY. A PROVISION CONSIDERING THE REQUIREMENT OF A JUNE APPOINTMENT TO FURTHER INSULATE THE OMBUDSMAN FROM THE POLITICAL PROCESS WAS CONSIDERED AND REJECTED AS UNNECESSARY.

SECTION 6. SALARY. THE OMBUDSMAN SHALL RECEIVE THE SAME SALARY, ALLOWANCES AND RELATED BENEFITS AS THE CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH.

COMMENT: SETTING THE SALARY IN THIS WAY INSURES A HIGH DEGREE OF PRESTIGE FOR THE OFFICE AND PREVENTS FUTURE DISPUTES, WHICH MAY HAVE A POLITICAL BASIS, ON THE LEVEL OF REMUNERATION. THE HAWAIIAN ACT AND SOME STAFF MEMBERS, DESIRING SPECIFICITY, RECOMMENDED A STATED AMOUNT BE USED.

SECTION 7. ORGANIZATION OF OFFICE. (A) THE OMBUDSMAN MAY SELECT, APPOINT, AND COMPENSATE AS HE MAY SEE FIT (WITHIN THE AMOUNT AVAILABLE BY APPROPRIATION) SUCH ASSISTANTS AND EMPLOYEES AS HE MAY DEEM NECESSARY TO DISCHARGE HIS RESPONSIBILITIES UNDER THIS ACT; PROVIDING THAT HE SHALL CONSULT WITH THE APPROPRIATE STATE PERSONNEL AGENCY BEFORE MAKING SUCH AN APPOINTMENT AND SHALL MAKE EVERY EFFORT TO CONFORM TO STANDARD STATE PERSONNEL PRACTICES.

(B) THE OMBUDSMAN SHALL DESIGNATE ONE OF HIS ASSISTANTS TO BE THE DEPUTY OMBUDSMAN, WITH AUTHORITY TO ACT IN HIS STEAD WHEN HE HIMSELF IS DISABLED OR ABSENT FOR A PROTRACTED PERIOD OF TIME.

(C) THE OMBUDSMAN MAY DELEGATE TO OTHER MEMBERS OF HIS STAFF ANY OF HIS AUTHORITY OR DUTIES UNDER THIS ACT EXCEPT THIS POWER OF DELEGATION AND THE DUTY OF FORMALLY MAKING RECOMMENDATIONS TO ADMINISTRATIVE AGENCIES OR REPORTS TO THE GOVERNOR OR THE GENERAL COURT.

COMMENT: IT IS THE BELIEF OF THE STAFF THAT THE OFFICE-HOLDER MUST HAVE THE MAXIMUM AMOUNT OF FREEDOM POSSIBLE IN THE SELECTION AND REMOVAL OF STAFF, THE SETTING OF SALARIES AND THE GENERAL USE OF FUNDS APPROPRIATED. IT WAS FELT, HOWEVER, THAT EVERY EFFORT SHOULD BE MADE BY THE OMBUDSMAN TO CONFORM TO ACCEPTED STATE PERSONNEL PRACTICES; WITHOUT FORCING SUCH ACTION THE PROVISION SUGGESTS IT AND REQUIRES CONSULTATION. THE DESIGNATION OF A DEPUTY IS NECESSARY IF THE OFFICE IS TO CONTINUE, SHOULD SOMETHING HAPPEN TO THE OMBUDSMAN. HOWEVER, EVEN THIS PROVISION WAS MADE WITH SOME STAFF RESERVATIONS.

SECTION 8. POWERS. THE OMBUDSMAN SHALL HAVE THE FOLLOWING POWERS:

(A) HE MAY INVESTIGATE, ON COMPLAINT OR ON HIS OWN MOTION, ANY ADMINISTRATIVE ACT OF ANY ADMINISTRATIVE AGENCY.

(B) HE MAY PRESCRIBE THE METHOD BY WHICH COMPLAINTS ARE TO BE MADE, RECEIVED, AND ACTED UPON; HE MAY DETERMINE THE SCOPE AND MANNER OF INVESTIGATIONS TO BE MADE; AND, SUBJECT TO THE REQUIREMENTS OF THIS ACT, HE MAY DETERMINE THE FORM, FREQUENCY, AND DISTRIBUTION OF HIS CONCLUSIONS AND RECOMMENDATIONS.

(C) HE MAY REQUEST AND SHALL BE GIVEN BY EACH ADMINISTRATIVE AGENCY THE ASSISTANCE AND INFORMATION HE DEEMS NECESSARY

FOR THE DISCHARGE OF HIS RESPONSIBILITIES; HE MAY EXAMINE THE RECORDS AND DOCUMENTS OF ALL ADMINISTRATIVE AGENCIES; AND HE MAY ENTER AND INSPECT PREMISES WITHIN ANY ADMINISTRATIVE AGENCY'S CONTROL.

(D) HE MAY ISSUE A SUBPOENA TO COMPEL ANY PERSON TO APPEAR, GIVE SWORN TESTIMONY, OR PRODUCE DOCUMENTARY OR OTHER EVIDENCE THE OMBUDSMAN DEEMS RELEVANT TO A MATTER UNDER HIS INQUIRY.

(E) HE MAY UNDERTAKE, PARTICIPATE IN, OR COOPERATE WITH GENERAL STUDIES OR INQUIRIES, WHETHER OR NOT RELATED TO ANY PARTICULAR ADMINISTRATIVE AGENCY OR ANY PARTICULAR ADMINISTRATIVE ACT, IF HE BELIEVES THEY MAY ENHANCE KNOWLEDGE ABOUT OR LEAD TO IMPROVEMENTS IN THE FUNCTIONING OF ADMINISTRATIVE AGENCIES.

COMMENT: THOUGH EVERY SUBSECTION OF SECTION 8 WAS SUBJECT TO SOME DISAGREEMENT, THE ABOVE REPRESENTS THE CONSENSUS OF THE RESPONDING STAFF MEMBERS ON THE POWERS OF THE AGENCY. THE SECTION IS IDENTICAL TO THE PROVISIONS OF THE MODEL ACT. IT ATTEMPTS TO PROVIDE ONLY THOSE POWERS NECESSARY TO THE PROPER FUNCTIONING OF THE OFFICE. IT IS TO BE EXPECTED THAT THE WORK OF THE OFFICE SHALL BE CONDUCTED PRIMARILY IN RESPONSE TO CITIZENS' COMPLAINTS. IT IS DESIRABLE TO PERMIT THE OFFICEHOLDER TO UNDERTAKE INVESTIGATIONS OR STUDIES ON HIS OWN INITIATIVE. SOME FOREIGN STATUTES REQUIRE COMPLAINTS TO BE MADE IN WRITING, BUT SUCH REQUIREMENTS MIGHT BE BETTER SET IN LIGHT OF THE OMBUDSMAN'S EXPERIENCE. THE REQUIREMENT OF FORMAL HEARINGS IS NOT MADE, BUT THE POWER TO SUBPOENA WITNESSES, PRODUCE DOCUMENTARY EVIDENCE AND HOLD SUCH HEARINGS IS GIVEN SUBJECT TO THE LIMITATIONS FOUND IN THE SECTION DEALING WITH THE RIGHTS AND DUTIES OF WITNESSES. THE POWER TO SUBPOENA WITNESSES, PRODUCE PAPERS, AND INSPECT PREMISES WILL PROBABLY BE USED ONLY INFREQUENTLY, THOUGH THE CAPACITY TO DO SO IS DESIRABLE.

#### SECTION 9. MATTERS APPROPRIATE FOR INVESTIGATION.

AN APPROPRIATE SUBJECT FOR INVESTIGATION IS AN ADMINISTRATIVE ACT OF AN AGENCY WHICH MIGHT BE:



- (1) CONTRARY TO LAW OR REGULATION;
- (2) UNREASONABLE, UNFAIR, OR OPPRESSIVE;
- (3) MISTAKEN IN LAW OR ARBITRARY IN ASCERTAINMENTS OF FACT;
- (4) IMPROPER IN MOTIVATION OR BASED ON IRRELEVANT CONSIDERATIONS;
- (5) UNCLEAR OR INADEQUATELY EXPLAINED WHEN REASONS SHOULD HAVE BEEN REVEALED;
- (6) INEFFICIENTLY PERFORMED; OR
- (7) OTHERWISE ERRONEOUS.

COMMENT: THE STATUTE SETS THESE EXTREMELY GENERAL PROVISIONS AS GUIDELINES FOR THE WORK OF THE OMBUDSMAN. SUBSECTION (3) ATTEMPTS TO COVER THOSE SITUATIONS WHERE A DECISION IS BASED ON AN EXTREMELY FLIMSY FACTUAL FOUNDATION. THE HAWAIIAN ACT USES THE WORDS "MISTAKE OF FACT," BUT SUCH A PROVISION MAY BE MISCONSTRUED AS AN INVITATION TO THE OFFICEHOLDER TO SUBSTITUTE HIS JUDGMENT FOR THAT OF COMPETENT STATE ADMINISTRATORS. IN ADDITION THE HAWAIIAN ACT PROVIDES THAT THE OMBUDSMAN MAY INVESTIGATE ACTS UNACCOMPANIED BY AN ADEQUATE STATEMENT OF REASONS. THIS MIGHT BE MISCONSTRUED AS A NEW REQUIREMENT THAT ALL ADMINISTRATIVE ACTS BE ACCOMPANIED BY A STATEMENT OF REASONS FOR THE ACTION. THOUGH THE PRIME RESPONSIBILITY FOR ADMINISTRATIVE EFFICIENCY WILL CONTINUE TO REST ELSEWHERE, INEFFICIENTLY MADE DETERMINATIONS MUST COME WITHIN THE PURVIEW OF THE OFFICE. SUBSECTION (7) IS A CATCH-ALL PROVISION DESIGNED TO COVER OFFICIAL RUDENESS AND OTHER ERRORS.

SECTION 10. ACTION ON COMPLAINTS. (A) THE OMBUDSMAN MAY RECEIVE A COMPLAINT FROM ANY SOURCE CONCERNING AN ADMINISTRATIVE ACT. HE SHALL CONDUCT A SUITABLE INVESTIGATION INTO THE ACTS COMPLAINED OF UNLESS HE BELIEVES THAT

- (1) THE GRIEVANCE PERTAINS TO A MATTER OUTSIDE THE OMBUDSMAN'S POWER;
- (2) THE COMPLAINANT'S INTEREST IS INSUFFICIENTLY RELATED TO THE SUBJECT MATTER;
- (3) THE COMPLAINT IS TRIVIAL, FRIVOLOUS, VEXATIOUS OR NOT MADE IN GOOD FAITH;

- (4) OTHER COMPLAINTS ARE MORE WORTHY OF ATTENTION;
- (5) THE OMBUDSMAN'S RESOURCES ARE INSUFFICIENT FOR INVESTIGATION; OR
- (6) THE COMPLAINT HAS BEEN TOO LONG DELAYED TO JUSTIFY PRESENT EXAMINATION OF ITS MERIT OR IS BASED ON AN ADMINISTRATIVE ACTION COMPLETED THREE YEARS PRIOR TO THE TIME IT WAS BROUGHT TO HIS ATTENTION.

THE OMBUDSMAN'S DECLINING TO INVESTIGATE A COMPLAINT SHALL NOT, HOWEVER, BAR HIM FROM PROCEEDING ON HIS OWN MOTION TO INQUIRE INTO THE MATTER COMPLAINED ABOUT OR INTO RELATED PROBLEMS:

COMMENT: THE DUTY TO ACT SHOULD NOT BE IMPOSED ON THE OMBUDSMAN. HE SHOULD BE FREE TO REJECT THOSE COMPLAINTS WHICH ARE NOT WORTHY OF CONSIDERATION. THE SPECIFIC LISTING ILLUSTRATES SIX TYPES OF COMPLAINTS WHICH MAY BE REJECTED. SUBSECTION (6) PROVIDES FOR A SPECIFIC STATUTE OF LIMITATIONS. A NUMBER OF OPPC STAFF MEMBERS FELT THAT SUCH SPECIFICITY WAS NECESSARY AND THUS GELLHORN'S GENERAL LANGUAGE WAS NOT USED. THE PROVISION OF A STATUTE OF LIMITATIONS IS IN LINE WITH FOREIGN PRACTICE, WHERE SUCH TIME LIMITS RUN FROM TWELVE MONTHS TO TEN YEARS.

(B) THE OMBUDSMAN MAY EXERCISE HIS POWERS WITHOUT REGARD TO THE FINALITY OF ANY ADMINISTRATIVE ACT, THOUGH HE MAY REQUIRE A COMPLAINANT TO PURSUE OTHER REMEDIES OR CHANNELS OF COMPLAINT OPEN TO HIM BEFORE THE OMBUDSMAN ACCEPTS THE COMPLAINT.

COMMENT: NEITHER THE HAWAIIAN ACT NOR THE GELLHORN MODEL WOULD REQUIRE THE EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO ACTION BY THE OMBUDSMAN. HOWEVER, IT WAS THE AUTHOR'S FEELING THAT THE ABOVE LANGUAGE CLARIFIES THE INTENTION TO ALLOW THE OMBUDSMAN TO REJECT A PREMATURE COMPLAINT WHILE ALSO ALLOWING HIM TO PROCEED, SHOULD THE EXIGENCIES OF THE SITUATION DEMAND IT.

(c) IF THE OMBUDSMAN DECIDES (1) NOT TO INVESTIGATE A COMPLAINT, HE SHALL INFORM THE COMPLAINANT OF THAT DECISION AND SHALL STATE HIS REASONS; (2) TO INVESTIGATE A COMPLAINT, HE SHALL NOTIFY THE COMPLAINANT OF HIS DECISION, AND HE SHALL NOTIFY THE AGENCY OF HIS INTENTION TO INVESTIGATE.

COMMENT: THIS FULL NOTICE PROVISION, BASED ON THE HAWAIIAN ACT, WHILE IT MAY BE SOMEWHAT BURDENSOME, IS DESIGNED TO INSURE THAT THE APPROPRIATE AGENCY AND THE COMPLAINANT ARE NOTIFIED OF EVERY ACTION THE OMBUDSMAN INTENDS TO TAKE. THE REQUIREMENT THAT THE OMBUDSMAN STATE HIS REASONS FOR REJECTING A COMPLAINT IS MEANT TO INSURE THE FULFILLMENT OF THE AGENCY'S EDUCATIONAL FUNCTION. WHILE GELLHORN HAS SAID THAT THERE ARE INSTANCES, SUCH AS WHEN COMPLAINTS ARE PLAINLY PSYCHOPATHIC RATHER THAN GOVERNMENTAL, WHEN A STATEMENT OF REASONS FOR REJECTION IS DIFFICULT, I BELIEVE WE CAN RELY ON THE OMBUDSMAN'S JUDGMENT TO AVOID THOSE DIFFICULTIES WITH A TACTFUL RESPONSE.

(d) AFTER COMPLETING HIS INVESTIGATION OF A COMPLAINT, THE OMBUDSMAN SHALL INFORM THE COMPLAINANT, THE AGENCY AND, WHEN APPROPRIATE, THE LEGISLATOR WHO HAS REFERRED THE COMPLAINT, OF THE ACTION TAKEN.

COMMENT: AGAIN WE HAVE A FULL NOTICE PROVISION THAT IS DESIGNED TO SUPPLEMENT SECTIONS 11, 12, AND 13 FOLLOWING. WHILE SOME MAY FEEL THAT SPECIFICALLY REQUIRING THE OMBUDSMAN TO INFORM A LEGISLATIVE INTERMEDIARY IS UNNECESSARY, SINCE THIS WOULD NORMALLY BE A MATTER OF ROUTINE, THE AUTHOR FEELS THAT INDIVIDUAL LEGISLATORS MAY FEEL MORE COMFORTABLE WITH THE PROVISION IF IT IS MANDATED.

(e) A LETTER TO THE OMBUDSMAN FROM A PERSON IN ANY INSTITUTION UNDER THE CONTROL OF AN ADMINISTRATIVE AGENCY OF THE COMMONWEALTH MUST BE IMMEDIATELY FORWARDED UNOPENED TO THE OMBUDSMAN.

COMMENT: THIS PROVISION IS DESIGNED TO INSURE READY ACCESS TO THE OMBUDSMAN WITHOUT FEAR OF REPRISAL OR OFFICIAL INTERFERENCE.

SECTION 11. CONSULTATION WITH AGENCY. BEFORE ANNOUNCING A CONCLUSION OR RECOMMENDATION THAT CRITICIZES AN ADMINISTRATIVE

AGENCY OR ANY PERSON, THE OMBUDSMAN SHALL CONSULT WITH THAT AGENCY OR PERSON. THE OMBUDSMAN SHALL NOT IN ANY PUBLIC REPORT CRITICIZE ANY INDIVIDUAL BY NAME WHO HAS PERMANENT, TEMPORARY OR PROVISIONAL CIVIL SERVICE STATUS. (THIS IS AN OPTIONAL PROVISION.)

COMMENT: THE FIRST PART OF THIS PROVISION WAS CONSIDERED VITAL BY ALL OPPC STAFF RESPONDING TO THE QUESTIONNAIRE. THERE WAS CONSIDERABLE DEBATE OVER THE IMPOSITION OF A REQUIREMENT THAT THE OMBUDSMAN SHOULD NOT CRITICIZE ANY INDIVIDUAL OF A PERMANENT, TEMPORARY OR PROVISIONAL CIVIL SERVICE STATUS BY NAME. MANY FELT THAT IT IS SUFFICIENT TO CRITICIZE AN AGENCY OR OFFICE WITHOUT NAMING THE SPECIFIC INDIVIDUALS INVOLVED. THERE WAS NO CONSENSUS AND SO THE ITEM WAS LEFT AS OPTIONAL.

SECTION 12. RECOMMENDATIONS. (A) IF, HAVING CONSIDERED A COMPLAINT, THE OMBUDSMAN IS OF THE OPINION THAT AN ADMINISTRATIVE AGENCY SHOULD (1) CONSIDER THE MATTER FURTHER, (2) MODIFY OR CANCEL AN ADMINISTRATIVE ACT, (3) ALTER A REGULATION OR RULING, (4) EXPLAIN MORE FULLY THE ADMINISTRATIVE ACT IN QUESTION, OR (5) TAKE ANY OTHER STEP, HE SHALL STATE HIS RECOMMENDATIONS TO THE AGENCY. IF THE OMBUDSMAN SO REQUESTS, THE AGENCY SHALL, WITHIN THE TIME SPECIFIED BY THE OMBUDSMAN, INFORM HIM OF THE ACTION TAKEN ON HIS RECOMMENDATIONS OR THE REASONS FOR NOT COMPLYING WITH THEM.

COMMENT: IT IS IMPORTANT TO NOTE THAT THIS SUB-SECTION FULLY ILLUSTRATES THE NATURE OF THE OMBUDSMAN'S POWER. HE CANNOT COMPEL ADMINISTRATIVE ACTION OR INACTION. HE IS IN NO WAY INTENDED TO BE A SUPER ADMINISTRATOR. HE MAY ADVISE, HE MAY SUGGEST, BUT HE CANNOT DEMAND.

(B) IF THE OMBUDSMAN BELIEVES THAT AN ADMINISTRATIVE ACTION HAS BEEN DICTATED BY LAWS WHOSE RESULTS ARE UNFAIR OR OTHERWISE OBJECTIONABLE, HE SHALL BRING THIS TO THE ATTENTION OF THE GENERAL COURT.

COMMENT: THE OMBUDSMAN IS NOT EXPECTED TO BE A GENERAL AGENCY OF SOCIAL REFORM, BUT HE MUST NOT BLIND HIMSELF TO LAWS WHICH HAVE UNJUST RESULTS.

SECTION 13. PUBLICATION OF RECOMMENDATIONS. THE OMBUDSMAN MAY PUBLISH HIS CONCLUSIONS, RECOMMENDATIONS, AND SUGGESTIONS BY TRANSMITTING THEM TO THE GOVERNOR, THE GENERAL COURT, OR ANY OF ITS COMMITTEES, THE PRESS OR OTHERS WHO MAY BE CONCERNED. WHEN PUBLISHING AN OPINION ADVERSE TO AN ADMINISTRATIVE AGENCY OR OFFICIAL, HE SHALL (UNLESS EXCUSED BY THE AGENCY OR OFFICIAL AFFECTED) INCLUDE THE SUBSTANCE OF ANY STATEMENT THE ADMINISTRATIVE AGENCY OR OFFICIAL MAY HAVE MADE TO HIM BY WAY OF EXPLAINING PAST DIFFICULTIES OR PRESENT REJECTION OF THE OMBUDSMAN'S PROPOSALS.

COMMENT: IF PERSUASION FAILS, THE OMBUDSMAN MUST BE PERMITTED TO GO TO THE BAR OF PUBLIC OPINION. IF HE DOES SO, HOWEVER, HE MUST BE REQUIRED TO MAKE PUBLIC THE OTHER SIDE OF THE STORY. THIS SECTION ALLOWS PUBLICATION BUT PROTECTS THE AGENCY BY REQUIRING THAT ITS VIEWS BE GIVEN AN ADEQUATE EXPOSURE.

SECTION 14. REPORTS. IN ADDITION TO WHATEVER REPORTS HE MAY MAKE FROM TIME TO TIME, THE OMBUDSMAN ON OR BEFORE FEBRUARY 1 OF EACH YEAR SHALL REPORT TO THE GENERAL COURT AND THE GOVERNOR CONCERNING THE EXERCISE OF HIS FUNCTIONS DURING THE PRECEDING CALENDAR YEAR. INSOFAR AS THE REPORT MAY CRITICIZE NAMED AGENCIES OR OFFICIALS, IT MUST ALSO INCLUDE THE SUBSTANCE OF THEIR REPLIES TO CRITICISM. (IF THE OPTIONAL PROVISION OF SECTION 12 HAS NOT BEEN ADOPTED, INCLUDE THE FOLLOWING: IN DISCUSSING MATTERS WITH WHICH HE HAS DEALT, THE OMBUDSMAN NEED NOT IDENTIFY THOSE IMMEDIATELY CONCERNED IF TO DO SO WOULD CAUSE NEEDLESS HARDSHIP.)

SECTION 15. DISCIPLINARY ACTION AGAINST PUBLIC PERSONNEL. IF THE OMBUDSMAN HAS REASON TO BELIEVE THAT

ANY PUBLIC OFFICIAL, EMPLOYEE OR OTHER PERSON HAS ACTED IN A MANNER WARRANTING CRIMINAL OR DISCIPLINARY PROCEEDINGS, HE SHALL REFER THE MATTER TO THE APPROPRIATE AUTHORITIES.

SECTION 16. OMBUDSMAN'S IMMUNITIES. (A) No PROCEEDING, OPINION, OR EXPRESSION OF THE OMBUDSMAN SHALL BE REVIEWABLE IN ANY COURT;

(B) No CIVIL ACTION SHALL LIE AGAINST THE OMBUDSMAN OR ANY MEMBER OF HIS STAFF FOR ANYTHING DONE OR SAID OR OMITTED IN DISCHARGING THE RESPONSIBILITIES CONTEMPLATED BY THIS ACT;

(C) NEITHER THE OMBUDSMAN NOR ANY MEMBER OF HIS STAFF SHALL BE REQUIRED TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING CONCERNING MATTERS WITHIN HIS OFFICIAL COGNIZANCE, EXCEPT IN A PROCEEDING BROUGHT TO ENFORCE THIS ACT.

COMMENT: SUBSECTION (A) PRECLUDING JUDICIAL REVIEW, RECOGNIZES THAT THE OMBUDSMAN ISSUES NO ORDERS AND TAKES NO STEPS THAT BAR ANYONE FROM PURSUING PREEXISTING REMEDIES. SUBSECTION (B) PRECLUDES HARRASSMENT OF THE OMBUDSMAN BY CIVIL SUIT AND IS SIMILAR TO THE IMMUNITY ENJOYED BY THE JUDICIARY. (IT, OF COURSE, DOES NOT PREVENT THE BRINGING OF A CRIMINAL ACTION, WHERE APPROPRIATE.) SUBSECTION (C) PREVENTS THE DISRUPTION OF THE OMBUDSMAN'S WORK BY REQUIRING HIM TO APPEAR AND TESTIFY ABOUT INFORMATION HE HAS RECEIVED (OFTEN CONFIDENTIALLY) WHILE PERFORMING HIS DUTIES. ONE STAFF MEMBER FEELS WE HAVE GONE TOO FAR IN THE EXTENSION OF IMMUNITY, EVEN THOUGH THIS PROVISION IS SIMILAR TO PROVISIONS FOUND IN THE HAWAIIAN ACT AND GELLHORN'S MODEL.

SECTION 17. RIGHTS AND DUTIES OF WITNESSES. (A) A PERSON REQUIRED BY THE OMBUDSMAN TO PROVIDE INFORMATION SHALL BE PAID THE SAME FEES AND TRAVEL ALLOWANCES AS ARE EXTENDED TO WITNESSES WHOSE ATTENDANCE HAS BEEN REQUIRED IN THE COURTS OF THIS STATE.

(B) A PERSON WHO, WITH OR WITHOUT SERVICE OF COMPULSORY PROCESS, PROVIDES ORAL OR DOCUMENTARY INFORMATION REQUESTED BY THE OMBUDSMAN SHALL BE ACCORDED THE SAME PRIVILEGES AND IMMUNITIES AS ARE EXTENDED TO WITNESSES IN THE COURTS OF THIS STATE, AND SHALL ALSO BE ENTITLED TO BE ACCOMPANIED AND ADVISED BY COUNSEL DURING QUESTIONING.

(C) IF A PERSON REFUSES TO RESPOND TO THE OMBUDSMAN'S SUBPOENA, REFUSES TO BE EXAMINED OR ENGAGES IN OBSTRUCTIVE MISCONDUCT, THE OMBUDSMAN SHALL CERTIFY THE FACTS TO THE SUPERIOR COURT. THE COURT SHALL THEREUPON ISSUE AN ORDER DIRECTING THE PERSON TO APPEAR BEFORE THE COURT TO SHOW CAUSE WHY HE SHOULD NOT BE PUNISHED AS FOR CONTEMPT. THE ORDER AND A COPY OF THE OMBUDSMAN'S CERTIFIED STATEMENT SHALL BE SERVED ON THE PERSON. THEREAFTER THE COURT SHALL HAVE JURISDICTION OF THE MATTER. THE SAME PROCEEDINGS SHALL BE HELD, THE SAME PENALTIES MAY BE IMPOSED, AND THE PERSON CHARGED MAY PURGE HIMSELF OF THE CONTEMPT IN THE SAME WAY AS IN THE CASE OF A PERSON WHO HAS COMMITTED A CONTEMPT IN THE TRIAL OF A CIVIL ACTION BEFORE THE COURT.

SECTION 18. OBSTRUCTION. A PERSON WHO WILLFULLY OBSTRUCTS OR HINDERS THE LAWFUL ACTIONS OF THE OMBUDSMAN OR HIS STAFF OR WILLFULLY REFUSES TO COMPLY WITH THEIR LAWFUL DEMANDS, SHALL BE FINED NOT MORE THAN ONE THOUSAND DOLLARS.

SECTION 19. RELATION TO OTHER LAWS. THE PROVISIONS OF THIS ACT ARE IN ADDITION TO AND DO NOT IN ANY MANNER LIMIT OR AFFECT THE PROVISIONS OF ANY OTHER ENACTMENT UNDER WHICH ANY REMEDY OR RIGHT OF APPEAL IS PROVIDED FOR ANY PERSON, OR

ANY PROCEDURE IS PROVIDED FOR THE INQUIRY INTO OR INVESTIGATION OF ANY MATTER. THE POWERS CONFERRED ON THE OMBUDSMAN MAY BE EXERCISED NOTWITHSTANDING ANY PROVISION IN ANY ENACTMENT TO THE EFFECT THAT ANY ADMINISTRATIVE ACTION SHALL BE FINAL AND UNAPPEALABLE.



## SUBSECTION C: CRITIQUE OF OMBUDSMAN PROPOSAL

THE OMBUDSMAN CONCEPT SHOULD NOT BE INTRODUCED AT A TIME WHEN WE ARE ATTEMPTING TO MAKE ALL OF STATE GOVERNMENT MORE RESPONSIVE TO THE PEOPLE IT SERVES. IT IS ALMOST AS IF WE ARE ADMITTING DEFEAT PRIOR TO THE INAUGURATION OF THE MODERNIZATION PROGRAM. MODERNIZATION DOES THREE THINGS TO IMPROVE GOVERNMENT-CITIZEN RELATIONS: (1) THE NEW STRUCTURE IS DESIGNED TO BE MORE RESPONSIBLE TO THE GOVERNOR WHO CAN THEN DIRECTLY RELATE TO THE ELECTORATE, (2) CLEAR LINES OF AUTHORITY AND RESPONSIBILITY WILL BE ESTABLISHED SO THAT THE CITIZEN WILL KNOW WHERE AND HOW TO REDRESS GRIEVANCES AND THE STREAM-LINED STRUCTURE WILL QUICKLY RESPOND, (3) FINALLY, THE NEW CABINET OFFICE OF ADMINISTRATION WILL BE ABLE TO SPOT AND CORRECT PATTERNS OF ADMINISTRATIVE ABUSE AND NEGLECT. DO NOT THESE REFORMS OBTAIN THE CALL FOR AN OMBUDSMAN? EVEN IF THEY DO NOT, SHOULD WE NOT WAIT TO SEE HOW THE NEW ADMINISTRATIVE MECHANISM FUNCTIONS BEFORE WE START DESIGNING OR EMPLOYING SUCH A CONTROL DEVICE.

THERE ARE OTHER QUESTIONS WHICH SHOULD BE ASKED AT THIS TIME. THE NOLEN BILL FOR AN OMBUDSMAN HAS NOT BEEN PASSED BY EITHER HOUSE. WILL NOT THE COMBINATION OF THIS BILL WITH THE MODERNIZATION ACT ONLY SUCCEED IN INCREASING OPPOSITION TO BOTH? SECONDLY, WHAT WILL BE THE EFFECT ON THE CIVIL SERVANTS OF THE COMMONWEALTH? STATE EMPLOYEES, ALREADY UNEASY OVER MODERNIZATION, MAY BECOME MORE SO.

WE DO NOT EVEN HAVE TO REACH THE QUESTION OF THE TOTAL DESIRABILITY OF THE OFFICE IN VIEW OF ITS POSSIBLE LONG-RANGE EFFECT ON MORALE. WE CAN SAY "NOT NOW".

THIS DISCUSSION HAS NOT ALLUDED TO THE MANY SUBSTANTIVE QUESTIONS WHICH SHOULD BE ASKED. SCANDANAVIAN COUNTRIES HAVE AN ENTIRELY DIFFERENT POLITICAL CLIMATE. ISN'T IT NAIVE TO SUPPOSE THAT WE CAN TRANSFER THIS GOVERNMENTAL INSTITUTION TO THE UNITED STATES? THE OMBUDSMAN NEEDS MUCH MORE STUDY. WHY SHOULD MASSACHUSETTS EXPERIMENT WITH A NEW DEVICE? WHY SHOULD THE COMMONWEALTH ADOPT A NEW, SHERLOCK HOLMES BUREAUCRATIC OVERLAY WITHOUT ADEQUATE INFORMATION ON THE FUNCTIONING OF THE OFFICE IN THE AMERICAN GOVERNMENTAL CONTEXT? FINALLY, WE MIGHT NOTE THAT THE OMBUDSMAN TO SOME EXTENT DUPLICATES THE FUNCTIONS OF THE STATE AUDITOR, COMMISSIONER OF ADMINISTRATION AND FINANCE, THE ATTORNEY GENERAL, THE LEGISLATORS. WE DO NOT NEED ANOTHER OMBUDSMAN. WE HAVE A GREAT MANY OFFICIALS AND AGENCIES WHO PRESENTLY ASSUME THE DUTIES OF AN OMBUDSMAN.





## APPENDIX A

## MODEL OMBUDSMAN STATUTE

## A BILL

TO ESTABLISH THE OFFICE OF OMBUDSMAN

IN.....

(ENACTMENT CLAUSE IN LOCALLY APPROPRIATE FORM)

SECTION 1 SHORT TITLE. THIS ACT MAY BE CITED AS THE .....(INSERT NAME OF STATE, CITY, OR OTHER ENTITY) OMBUDSMAN ACT.

SECTION 2. DEFINITIONS. AS USED IN THIS ACT, THE TERM

(A) "ADMINISTRATIVE AGENCY" MEANS ANY DEPARTMENT OR OTHER GOVERNMENTAL UNIT, ANY OFFICIAL, OR ANY EMPLOYEE OF ..... (STATE, CITY, OR OTHER ENTITY INVOLVED) ACTING OR PURPORTING TO ACT BY REASON OF CONNECTION WITH ..... (AGAIN INSERT NAME OF STATE, CITY, OR OTHER ENTITY); BUT IT DOES NOT INCLUDE (1) ANY COURT OR JUDGE OR APPURTENANT JUDICIAL STAFF, (2) THE MEMBERS, COMMITTEES, OR STAFFS OF THE ..... (INSERT NAME OF THE LEGISLATIVE BODY, E.G., CITY COUNCIL) OR (3) THE ..... (INSERT TITLE OF CHIEF EXECUTIVE) OR HIS PERSONAL STAFF.

(B) "ADMINISTRATIVE ACT" INCLUDES EVERY ACTION (SUCH AS DECISIONS, OMISSIONS, RECOMMENDATIONS, PRACTICES, OR PROCEDURES) OF AN ADMINISTRATIVE AGENCY.

SECTION 3. ESTABLISHMENT OF OFFICE. THE OFFICE OF OMBUDSMAN IS HEREBY ESTABLISHED AS AN INDEPENDENT AGENCY OF ..... (INSERT NAME OF STATE, CITY, OR OTHER ENTITY).

SECTION 4. APPOINTMENT. THE ..... (INSERT TITLE OF CHIEF EXECUTIVE) SHALL APPOINT THE OMBUDSMAN, SUBJECT TO CONFIRMATION BY TWO-THIRDS OF THE MEMBERS OF EACH CHAMBER OF THE ..... (INSERT NAME OF LEGISLATIVE BODY) PRESENT AND VOTING.

SECTION 5. QUALIFICATIONS. THE OMBUDSMAN SHALL BE A PERSON WELL EQUIPPED TO ANALYZE PROBLEMS OF LAW, ADMINISTRATION AND PUBLIC POLICY, AND SHALL NOT BE ACTIVELY INVOLVED IN PARTISAN AFFAIRS.

SECTION 6. TERM OF OFFICE. (A) THE OMBUDSMAN SHALL SERVE FOR A TERM OF FIVE YEARS, UNLESS REMOVED BY VOTE OF TWO-THIRDS OF THE MEMBERS OF EACH OF THE TWO CHAMBERS OF THE ..... (INSERT NAME OF LEGISLATIVE BODY) UPON THEIR DETERMINING THAT HE HAS BECOME INCAPACITATED OR HAS BEEN GUILTY OF NEGLECT OF DUTY OR MISCONDUCT; (B) IF THE OFFICE OF OMBUDSMAN BECOMES VACANT FOR ANY CAUSE, THE DEPUTY OMBUDSMAN SHALL SERVE AS ACTING OMBUDSMAN UNTIL AN OMBUDSMAN HAS BEEN APPOINTED FOR A FULL TERM.

SECTION 7. SALARY. THE OMBUDSMAN SHALL RECEIVE THE SAME SALARY, ALLOWANCES, AND RELATED BENEFITS AS THE CHIEF JUDGE OF THE HIGHEST COURT OF ..... (NAME OF STATE)

SECTION 8. ORGANIZATION OF OFFICE. (A) THE OMBUDSMAN MAY SELECT, APPOINT, AND COMPENSATE AS HE MAY SEE FIT (WITHIN THE AMOUNT AVAILABLE BY APPROPRIATION) SUCH ASSISTANTS AND EMPLOYEES AS HE MAY DDDM NECESSARY TO DISCHARGE HIS RESPONSIBILITIES UNDER THIS ACT;

(B) THE OMBUDSMAN SHALL DESIGNATE ONE OF HIS ASSISTANTS TO BE THE DEPUTY OMBUDSMAN, WITH AUTHORITY TO ACT IN HIS STEAD WHEN HE HIMSELF IS DISABLED OR PROTRACTEDLY ABSENT;

(C) THE OMBUDSMAN MAY DELEGATE TO OTHER MEMBERS OF HIS STAFF ANY OF HIS AUTHORITY OR DUTIES UNDER THIS ACT EXCEPT THIS POWER OF DELEGATION AND THE DUTY OF FORMALLY MAKING RECOMMENDATIONS TO ADMINISTRATIVE AGENCIES OR REPORTS TO THE ..... (INSERT TITLE OF CHIEF EXECUTIVE) OR THE ..... (INSERT NAME OF LEGISLATIVE BODY).

SECTION 9. POWERS. THE OMBUDSMAN SHALL HAVE THE FOLLOWING POWERS:

(A) HE MAY INVESTIGATE, ON COMPLAINT OR ON HIS OWN MOTION, ANY ADMINISTRATIVE ACT OF ANY ADMINISTRATIVE AGENCY;

(B) HE MAY PRESCRIBE THE METHODS BY WHICH COMPLAINTS ARE TO BE MADE, RECEIVED, AND ACTED UPON; HE MAY DETERMINE THE SCOPE AND MANNER OF INVESTIGATIONS TO BE MADE; AND, SUBJECT TO THE REQUIREMENTS OF THIS ACT, HE MAY DETERMINE THE FORM, FREQUENCY, AND DISTRIBUTION OF HIS CONCLUSIONS AND RECOMMENDATIONS;

(C) HE MAY REQUEST AND SHALL BE GIVEN BY EACH ADMINISTRATIVE AGENCY THE ASSISTANCE AND INFORMATION HE DEEMS NECESSARY FOR THE DISCHARGE OF HIS RESPONSIBILITIES; HE MAY EXAMINE THE RECORDS AND DOCUMENTS OF ALL ADMINISTRATIVE AGENCIES; AND HE MAY ENTER AND INSPECT PREMISES WITHIN ANY ADMINISTRATIVE AGENCY'S CONTROL.

(D) HE MAY ISSUE A SUBPOENA TO COMPEL ANY PERSON TO APPEAR, GIVE SWORN TESTIMONY, OR PRODUCE DOCUMENTARY OR OTHER EVIDENCE THE OMBUDSMAN DEEMS RELEVANT TO A MATTER UNDER HIS INQUIRY.

(E) HE MAY UNDERTAKE, PARTICIPATE IN, OR COOPERATE WITH GENERAL STUDIES OR INQUIRIES, WHETHER OR NOT RELATED TO ANY PARTICULAR ADMINISTRATIVE AGENCY OR ANY PARTICULAR ADMINISTRATIVE ACT, IF HE BELIEVES THAT THEY MAY ENHANCE KNOWLEDGE ABOUT OR LEAD TO IMPROVEMENTS IN THE FUNCTIONING OF ADMINISTRATIVE AGENCIES.

SECTION 10. MATTERS APPROPRIATE FOR INVESTIGATION.

(A) IN SELECTING MATTERS FOR HIS ATTENTION, THE OMBUDSMAN SHOULD ADDRESS HIMSELF PARTICULARLY TO AN ADMINISTRATIVE ACT THAT MIGHT BE

1. CONTRARY TO LAW OR REGULATION;
2. UNREASONABLE, UNFAIR OPPRESSIVE, OR INCONSISTENT

WITH THE GENERAL COURSE OF AN ADMINISTRATIVE AGENCY'S FUNCTIONING;

3. MISTAKEN IN LAW OR ARBITRARY IN ASCERTAINMENTS OF FACT;

4. IMPROPER IN MOTIVATION OR BASED ON IRRELEVANT CONSIDERATIONS;

5. UNCLEAR OR INADEQUATELY EXPLAINED WHEN REASONS SHOULD HAVE BEEN REVEALED;

6. INEFFICIENTLY PERFORMED; OR

7. OTHERWISE OBJECTIONABLE;

SECTION 11. ACTION ON COMPLAINTS. (A) THE OMBUDSMAN MAY RECEIVE A COMPLAINT FROM ANY SOURCE CONCERNING AN ADMINISTRATIVE ACT. HE SHALL CONDUCT A SUITABLE INVESTIGATION INTO THE THINGS COMPLAINED OF UNLESS HE BELIEVES THAT

1. THE COMPLAINANT HAS AVAILABLE TO HIM ANOTHER REMEDY OR CHANNEL OF COMPLAINT WHICH HE COULD REASONABLY BE EXPECTED TO USE;

2. THE GRIEVANCE PERTAINS TO A MATTER OUTSIDE THE OMBUDSMAN'S POWER;

3. THE COMPLAINANT'S INTEREST IS INSUFFICIENTLY RELATED TO THE SUBJECT MATTER;

4. THE COMPLAINT IS TRIVIAL, FRIVOLOUS, VEXATIOUS, OR NOT MADE IN GOOD FAITH;

5. OTHER COMPLAINTS ARE MORE WORTHY OF ATTENTION;

6. THE OMBUDSMAN'S RESOURCES ARE INSUFFICIENT FOR ADEQUATE INVESTIGATION; OR

7. THE COMPLAINT HAS BEEN TOO LONG DELAYED TO JUSTIFY PRESENT EXAMINATION OF ITS MERIT.

THE OMBUDSMAN'S DECLINING TO INVESTIGATE A COMPLAINT SHALL NOT, HOWEVER, BAR HIM FROM PROCEEDING ON HIS OWN MOTION TO INQUIRE INTO THE MATTER COMPLAINED ABOUT OR INTO RELATED PROBLEMS;

(B) AFTER COMPLETING HIS CONSIDERATION OF A COMPLAINT (WHETHER OR NOT ITS HAS BEEN INVESTIGATED) THE OMBUDSMAN SHALL SUITABLY INFORM THE COMPLAINANT AND, WHEN APPROPRIATE, THE ADMINISTRATIVE AGENCY OR AGENCIES INVOLVED.

(C) A LETTER TO THE OMBUDSMAN FROM A PERSON IN A PLACE OF DETENTION OR IN A HOSPITAL OR OTHER INSTITUTION UNDER THE CONTROL OF AN ADMINISTRATIVE AGENCY SHALL BE IMMEDIATELY FORWARDED, UNOPENED, TO THE OMBUDSMAN.

SECTION 12. CONSULTATION WITH AGENCY. BEFORE ANNOUNCING A CONCLUSION OR RECOMMENDATION THAT CRITICIZES AN ADMINISTRATIVE AGENCY OR ANY PERSON, THE OMBUDSMAN SHALL CONSULT WITH THAT AGENCY OR PERSON.

SECTION 13. RECOMMENDATIONS. (A) IF, HAVING CONSIDERED A COMPLAINT AND WHATEVER MATERIAL HE DEEMS PERTINENT, THE OMBUDSMAN IS OF THE OPINION THAT AN ADMINISTRATIVE AGENCY SHOULD 1) CONSIDER THE MATTER FURTHER, 2) MODIFY OR CANCEL AN ADMINISTRATIVE ACT, 3) ALTER A REGULATION OR RULING, 4) EXPLAIN MORE FULLY THE ADMINISTRATIVE ACT IN QUESTION OR 5) TAKE ANY OTHER STEP, HE SHALL STATE HIS RECOMMENDATIONS TO THE ADMINISTRATIVE AGENCY. IF THE OMBUDSMAN SO REQUESTS, THE AGENCY SHALL, WITHIN

THE TIME HE HAS SPECIFIED, INFORM HIM ABOUT THE ACTION TAKEN ON HIS RECOMMENDATIONS OR THE REASONS FOR NOT COMPLYING WITH THEM;

(B) IF THE OMBUDSMAN BELIEVES THAT AN ADMINISTRATIVE ACTION HAS BEEN DICTATED BY LAWS WHOSE RESULTS ARE UNFAIR OR OTHERWISE OBJECTIONABLE, HE SHALL BRING TO THE ..... (NAME OF LEGISLATIVE BODY)'S NOTICE HIS VIEWS CONCERNING DESIRABLE STATUTORY CHANGE.

SECTION 14. PUBLICATION OF RECOMMENDATIONS. THE OMBUDSMAN MAY PUBLISH HIS CONCLUSIONS, RECOMMENDATIONS, AND SUGGESTIONS BY TRANSMITTING THEM TO THE ..... (TITLE OF CHIEF EXECUTIVE), THE ..... (NAME OF LEGISLATIVE BODY) OR ANY OF ITS COMMITTEES, THE PRESS, AND OTHERS WHO MAY BE CONCERNED. WHEN PUBLISHING AN OPINION ADVERSE TO AN ADMINISTRATIVE AGENCY OR OFFICIAL HE SHALL (UNLESS EXCUSED BY THE AGENCY OR OFFICIAL AFFECTED) INCLUDE THE SUBSTANCE OF ANY STATEMENT THE ADMINISTRATIVE AGENCY OR OFFICIAL AFFECTED) INCLUDE THE SUBSTANCE OF ANY STATEMENT THE ADMINISTRATIVE AGENCY OR OFFICIAL MAY HAVE MADE TO HIM BY WAY OF EXPLAINING PAST DIFFICULTIES OR PRESENT REJECTION OF THE OMBUDSMAN'S PROPOSALS.

SECTION 15. REPORTS. IN ADDITION TO WHATEVER REPORTS HE MAY MAKE FROM TIME TO TIME, THE OMBUDSMAN SHALL ON OR ABOUT FEBRUARY 15 OF EACH YEAR REPORT TO THE ..... (NAME OF LEGISLATIVE BODY) AND TO THE ..... (TITLE OF THE CHIEF EXECUTIVE) CONCERNING THE EXERCISES OF HIS FUNCTIONS DURING THE PRECEDING CALENDAR YEAR. IN DISCUSSING MATTERS WITH WHICH HE HAS DEALT, THE OMBUDSMAN NEED NOT IDENTIFY THOSE IMMEDIATELY CONCERNED IF TO DO SO WOULD CAUSE NEEDLESS HARDSHIP. SO FAR AS THE ANNUAL REPORT MAY CRITICIZE NAMED AGENCIES OR OFFICIALS, IT MUST ALSO INCLUDE THE SUBSTANCE OF THEIR REPLIES TO THE CRITICISM.

SECTION 16. DISCIPLINARY ACTION AGAINST PUBLIC PERSONNEL. IF THE OMBUDSMAN HAS REASON TO BELIEVE THAT ANY PUBLIC OFFICIAL, EMPLOYEE, OR OTHER PERSON HAS ACTED IN A MANNER WARRANTING CRIMINAL OR DISCIPLINARY PROCEEDINGS, HE SHALL REFER THE MATTER TO THE APPROPRIATE AUTHORITIES.

SECTION 17. OMBUDSMAN'S IMMUNITIES. (A) NO PROCEEDING, OPINION, OR EXPRESSION OF THE OMBUDSMAN SHALL BE REVIEWABLE IN ANY COURT;

(B) NO CIVIL ACTION SHALL LIE AGAINST THE OMBUDSMAN OR ANY MEMBER OF HIS STAFF FOR ANYTHING DONE OR SAID OR OMITTED, IN DISCHARGING THE RESPONSIBILITIES CONTEMPLATED BY THIS ACT;

(C) NEITHER THE OMBUDSMAN NOR ANY MEMBER OF HIS STAFF SHALL BE REQUIRED TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING CONCERNING MATTERS WITHIN HIS OFFICIAL COGNIZANCE, EXCEPT IN A PROCEEDING BROUGHT TO ENFORCE THIS ACT.



SECTION 18. RIGHTS AND DUTIES OF WITNESSES. (A) A PERSON REQUIRED BY THE OMBUDSMAN TO PROVIDE INFORMATION SHALL BE PAID THE SAME FEES AND TRAVEL ALLOWANCES AS ARE EXTENDED TO WITNESSES WHOSE ATTENDANCE HAS BEEN REQUIRED IN THE COURTS OF THIS STATE;

(B) A PERSON WHO, WITH OR WITHOUT SERVICE OF COMPULSORY PROCESS, PROVIDES ORAL OR DOCUMENTARY INFORMATION REQUESTED BY THE OMBUDSMAN SHALL BE ACCORDED THE SAME PRIVILEGES AND IMMUNITIES AS ARE EXTENDED TO WITNESSES IN THE COURTS OF THIS STATE, AND SHALL ALSO BE ENTITLED TO BE ACCOMPANIED AND ADVISED BY COUNSEL WHILE BEING QUESTIONED.

(C) IF A PERSON REFUSES TO RESPOND TO THE OMBUDSMAN'S SUBPOENA, REFUSES TO BE EXAMINED, OR ENGAGES IN OBSTRUCTIVE MISCONDUCT, THE OMBUDSMAN SHALL CERTIFY THE FACTS TO THE ..... (INSERT NAME OF SUITABLE COURT). THE COURT SHALL THEREUPON ISSUE AN ORDER DIRECTING THE PERSON TO APPEAR BEFORE THE COURT TO SHOW CAUSE WHY HE SHOULD NOT BE PUNISHED AS FOR CONTEMPT. THE ORDER AND A COPY OF THE OMBUDSMAN'S CERTIFIED STATEMENT SHALL BE SERVED ON THE PERSON. THEREAFTER THE COURT SHALL HAVE JURISDICTION OF THE MATTER. THE SAME PROCEEDINGS SHALL BE HAD, THE SAME PENALTIES MAY BE IMPOSED, AND THE PERSON CHARGED MAY PURGE HIMSELF OF THE CONTEMPT IN THE SAME WAY AS IN THE CASE OF A PERSON WHO HAS COMMITTED A CONTEMPT IN THE TRIAL OF A CIVIL ACTION BEFORE THE COURT.

SECTION 19. OBSTRUCTION. A PERSON WHO WILLFULLY OBSTRUCTS OR HINDERS THE PROPER EXERCISE OF THE OMBUDSMAN'S FUNCTIONS, OR WHO WILLFULLY MISLEADS OR ATTEMPTS TO MISLEAD THE OMBUDSMAN IN HIS INQUIRIES, SHALL BE FINED NOT MORE THAN \$1,000.

SECTION 20. RELATION TO OTHER LAWS. THE PROVISIONS OF THIS ACT ARE IN ADDITION TO AND DO NOT IN ANY MANNER LIMIT OR AFFECT THE PROVISIONS OF ANY OTHER ENACTMENT UNDER WHICH ANY PERSON, OR ANY PROCEDURE IS PROVIDED FOR THE INQUIRY INTO OR INVESTIGATION OF ANY MATTER. THE POWERS CONFERRED ON THE OMBUDSMAN MAY BE EXERCISED NOTWITHSTANDING ANY PROVISION IN ANY ENACTMENT TO THE EFFECT THAT ANY ADMINISTRATIVE ACTION SHALL BE FINAL OR UNAPPEALABLE.

SECTION 21. APPROPRIATION. THERE ARE HEREBY AUTHORIZED TO BE APPROPRIATED SUCH SUMS AS MAY BE NECESSARY TO CARRY OUT THE PROVISIONS OF THIS ACT.

SECTION 22. EFFECTIVE DATE. THIS ACT SHALL TAKE EFFECT IMMEDIATELY.



## APPENDIX B

## A BILL FOR AN ACT

## RELATING TO THE OFFICE OF THE OMBUDSMAN

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. SHORT TITLE. THIS ACT MAY BE CALLED "THE OMBUDSMAN ACT OF 1967."

## SECTION 2. DEFINITIONS.

(A) "AGENCY" INCLUDES ANY PERMANENT GOVERNMENTAL ENTITY, DEPARTMENT, ORGANIZATION, OR INSTITUTION, AND ANY OFFICER, EMPLOYEE, OR MEMBER THEREOF ACTING OR PURPORTING TO ACT IN THE EXERCISE OF HIS OFFICIAL DUTIES, EXCEPT:

- (1) A COURT;
- (2) THE LEGISLATURE, ITS COMMITTEES, AND ITS STAFF;
- (3) AN ENTITY OF THE FEDERAL GOVERNMENT;
- (4) A MULTI-STATE GOVERNMENTAL ENTITY; AND
- (5) THE GOVERNOR AND HIS PERSONAL STAFF.

(B) "ADMINISTRATIVE ACT" INCLUDES ANY ACTION, OMISSION, DECISION, RECOMMENDATION, PRACTICE, OR PROCEDURE, BUT DOES NOT INCLUDE THE PREPARATION OR PRESENTATION OF LEGISLATION.

SECTION 3. OMBUDSMAN; OFFICE ESTABLISHED, APPOINTMENT, TENURE, REMOVAL, QUALIFICATIONS, COMPENSATION, VACANCY. THE OFFICE OF OMBUDSMAN IS ESTABLISHED. THE LEGISLATURE, BY A MAJORITY VOTE OF EACH HOUSE IN JOINT SESSION, SHALL APPOINT AN OMBUDSMAN WHO SHALL SERVE FOR A PERIOD OF SIX YEARS. AN OMBUDSMAN MAY BE REAPPOINTED BUT MAY NOT SERVE FOR MORE THAN THREE TERMS. THE LEGISLATURE, BY TWO-THIRDS VOTE OF THE MEMBERS IN JOINT SESSION, MAY REMOVE OR SUSPEND THE OMBUDSMAN FROM OFFICE, BUT ONLY FOR NEGLECT OF DUTY, MISCONDUCT, OR DISABILITY.

NO PERSON MAY SERVE AS OMBUDSMAN WITHIN TWO YEARS OF THE LAST DAY ON WHICH HE SERVED AS A MEMBER OF THE LEGISLATURE, OR WHILE HE IS A CANDIDATE FOR OR HOLDS ANY OTHER STATE OFFICE, OR WHILE HE IS ENGAGED IN ANY OTHER OCCUPATION FOR REWARD OR PROFIT.

THE COMPENSATION OF THE OMBUDSMAN SHALL BE \$22,000 PER ANNUM. THE COMPENSATION OF THE OMBUDSMAN SHALL NOT BE DIMINISHED DURING HIS TERM OF OFFICE, UNLESS BY GENERAL LAW APPLYING TO ALL SALARIED OFFICERS OF THE STATE.

IF THE OMBUDSMAN DIES, RESIGNS, BECOMES INELIGIBLE TO SERVE, OR IS REMOVED OR SUSPENDED FROM OFFICE, THE FIRST ASSISTANT TO THE OMBUDSMAN BECOMES THE ACTING OMBUDSMAN UNTIL A NEW OMBUDSMAN IS APPOINTED FOR A FULL TERM.

SECTION 4. ASSISTANCE, STAFF, DELEGATION. THE OMBUDSMAN SHALL APPOINT A FIRST ASSISTANT, AND SUCH OTHER OFFICERS AND EMPLOYEES AS MAY BE NECESSARY TO CARRY OUT THIS ACT. ALL EMPLOYEES, INCLUDING THE FIRST ASSISTANT, SHALL BE HIRED BY THE OMBUDSMAN AND SHALL SERVE AT HIS PLEASURE. IN DETERMINING THE SALARY OF EACH SUCH EMPLOYEE, THE OMBUDSMAN SHALL CONSULT WITH THE DEPARTMENT OF PERSONNEL AND SHALL FOLLOW AS CLOSELY AS POSSIBLE THE RECOMMENDATIONS OF THE DEPARTMENT. THE FIRST ASSISTANT'S SALARY SHALL NOT EXCEED THE PERCENTAGE LIMITATION ESTABLISHED BY LAW FOR A DEPUTY DIRECTOR OF A DEPARTMENT. THE OMBUDSMAN AND HIS FULL-TIME STAFF SHALL BE ENTITLED TO PARTICIPATE IN ANY EMPLOYEE BENEFIT PLAN.

THE OMBUDSMAN MAY DELEGATE TO HIS APPOINTEES ANY OF HIS DUTIES EXCEPT THOSE SPECIFIED IN SECTION 13 AND 14.

SECTION 5. PROCEDURE. THE OMBUDSMAN MAY ESTABLISH PROCEDURES FOR RECEIVING AND PROCESSING COMPLAINTS, CONDUCTING INVESTIGATIONS, AND REPORTING HIS FINDINGS. HOWEVER, HE MAY NOT LEVY FEES FOR THE SUBMISSION OR INVESTIGATION OF COMPLAINTS.

SECTION 6. JURISDICTION. THE OMBUDSMAN HAS JURISDICTION TO INVESTIGATE THE ADMINISTRATIVE ACTS OF AGENCIES, AND HE MAY EXERCISE HIS POWERS WITHOUT REGARD TO THE FINALITY OF ANY ADMINISTRATIVE ACT.

SECTION 7. INVESTIGATION OF COMPLAINTS.

(A) THE OMBUDSMAN SHALL INVESTIGATE ANY COMPLAINT WHICH HE DETERMINES TO BE AN APPROPRIATE SUBJECT FOR INVESTIGATION UNDER SECTION 9.

(B) THE OMBUDSMAN MAY INVESTIGATE ON HIS OWN MOTION IF HE REASONABLY BELIEVES THAT AN APPROPRIATE SUBJECT FOR INVESTIGATION UNDER SECTION 9 EXISTS.

SECTION 8. NOTICE TO COMPLAINANT AND AGENCY. IF THE OMBUDSMAN DECIDES NOT TO INVESTIGATE, HE SHALL INFORM THE COMPLAINANT OF THAT DECISION AND SHALL STATE HIS REASONS.

IF THE OMBUDSMAN DECIDES TO INVESTIGATE, HE SHALL NOTIFY THE COMPLAINANT OF HIS DECISION, AND HE SHALL NOTIFY THE AGENCY OF HIS INTENTION TO INVESTIGATE.

SECTION 9. APPROPRIATE SUBJECTS FOR INVESTIGATION. AN APPROPRIATE SUBJECT FOR INVESTIGATION IS AN ADMINISTRATIVE ACT OF AN AGENCY WHICH MIGHT BE:

- (1) CONTRARY TO LAW;
- (2) UNREASONABLE, UNFAIR, OPPRESSIVE, OR UNNECESSARILY DISCRIMINATORY, EVEN THOUGH IN ACCORDANCE WITH LAW;
- (3) BASED ON A MISTAKE OF FACT;
- (4) BASED ON IMPROPER OR IRRELEVANT GROUNDS;
- (5) UNACCOMPANIED BY AN ADEQUATE STATEMENT OF REASONS;
- (6) PERFORMED IN AN INEFFICIENT MANNER; OR
- (7) OTHERWISE ERRONEOUS.

THE OMBUDSMAN MAY INVESTIGATE TO FIND AN APPROPRIATE REMEDY.

## SECTION 10. INVESTIGATION PROCEDURES.

(A) IN AN INVESTIGATION, THE OMBUDSMAN MAY MAKE INQUIRIES AND OBTAIN INFORMATION AS HE THINKS FIT; ENTER WITHOUT NOTICE TO INSPECT THE PREMISES OF AN AGENCY; AND HOLD PRIVATE HEARINGS.

(B) THE OMBUDSMAN IS REQUIRED TO MAINTAIN SECRECY IN RESPECT TO ALL MATTERS AND THE IDENTITIES OF THE COMPLAINANTS OR WITNESSES COMING BEFORE HIM EXCEPT SO FAR AS DISCLOSURES MAY BE NECESSARY TO ENABLE HIM TO CARRY OUT HIS DUTIES AND TO SUPPORT HIS RECOMMENDATIONS.

SECTION 11. POWERS. SUBJECT TO THE PRIVILEGES WHICH WITNESSES HAVE IN THE COURTS OF THIS STATE, THE OMBUDSMAN MAY:

(1) COMPEL AT A SPECIFIED TIME AND PLACE, BY A SUBPOENA, THE APPEARANCE AND SWORN TESTIMONY OF ANY PERSON WHO THE OMBUDSMAN REASONABLY BELIEVES MAY BE ABLE TO GIVE INFORMATION RELATING TO A MATTER UNDER INVESTIGATION; AND

(2) COMPEL ANY PERSON TO PRODUCE DOCUMENTS, PAPERS, OR OBJECTS WHICH THE OMBUDSMAN REASONABLY BELIEVES MAY RELATE TO A MATTER UNDER INVESTIGATION.

THE OMBUDSMAN MAY BRING SUIT IN AN APPROPRIATE STATE COURT TO ENFORCE THESE POWERS.

SECTION 13. PROCEDURE AFTER INVESTIGATION. IF, AFTER INVESTIGATION, THE OMBUDSMAN FINDS THAT:

(1) A MATTER SHOULD BE FURTHER CONSIDERED BY THE AGENCY;

(2) AN ADMINISTRATIVE ACT SHOULD BE MODIFIED OR CANCELLED;

(3) A STATUTE OR REGULATION ON WHICH AN ADMINISTRATIVE ACT IS BASED SHOULD BE ALTERED;

(4) REASONS SHOULD BE GIVEN FOR AN ADMINISTRATIVE ACT; OR

(5) ANY OTHER ACTION SHOULD BE TAKEN BY THE AGENCY; HE SHALL REPORT HIS OPINION AND RECOMMENDATIONS TO THE AGENCY. HE MAY REQUEST THE AGENCY TO NOTIFY HIM, WITHIN A SPECIFIED TIME, OF ANY ACTION TAKEN ON HIS RECOMMENDATIONS.

SECTION 14. PUBLICATION OF RECOMMENDATIONS. AFTER A REASONABLE TIME HAS ELAPSED, THE OMBUDSMAN MAY PRESENT HIS OPINION AND RECOMMENDATIONS TO THE GOVERNOR, THE LEGISLATURE, THE PUBLIC, OR ANY OF THESE. THE OMBUDSMAN SHALL INCLUDE WITH THIS OPINION ANY REPLY MADE BY THE AGENCY.

SECTION 15. NOTICE TO THE COMPLAINANT. AFTER A REASONABLE TIME HAS ELAPSED, THE OMBUDSMAN SHALL NOTIFY THE COMPLAINANT OF THE ACTIONS TAKEN BY HIM AND BY THE AGENCY.

SECTION 16. MISCONDUCT BY AGENCY PERSONNEL. IF THE OMBUDSMAN THINKS THERE IS A BREACH OF DUTY OR MISCONDUCT BY ANY OFFICER OR EMPLOYEE OF AN AGENCY, HE SHALL REFER THE MATTER TO THE APPROPRIATE AUTHORITIES.

SECTION 17. ANNUAL REPORT. THE OMBUDSMAN SHALL SUBMIT TO THE LEGISLATURE AND THE PUBLIC AN ANNUAL REPORT DISCUSSING HIS ACTIVITIES UNDER THIS ACT.

SECTION 18. JUDICIAL REVIEW, IMMUNITY. NO PROCEEDING OR DECISION OF THE OMBUDSMAN MAY BE REVIEWED IN ANY COURT, UNLESS IT CONTRAVENES THE PROVISIONS OF THIS ACT. THE OMBUDSMAN HAS THE SAME IMMUNITIES FROM CIVIL AND CRIMINAL LIABILITY AS A JUDGE OF THIS STATE. THE OMBUDSMAN AND HIS STAFF SHALL NOT TESTIFY IN ANY COURT WITH RESPECT TO MATTERS COMING TO THEIR ATTENTION IN THE EXERCISE OR PURPORTED EXERCISE OF THEIR OFFICIAL DUTIES EXCEPT AS MAY BE NECESSARY TO ENFORCE THE PROVISIONS OF THIS ACT.

SECTION 19. AGENCIES MAY NOT OPEN LETTERS TO OMBUDSMAN. A LETTER TO THE OMBUDSMAN FROM A PERSON HELD IN CUSTODY BY AN AGENCY SHALL BE FORWARDED IMMEDIATELY, UNOPENED, TO THE OMBUDSMAN.

SECTION 20. PENALTY FOR OBSTRUCTION. A PERSON WHO WILLFULLY HINDERS THE LAWFUL ACTIONS OF THE OMBUDSMAN OR HIS STAFF, OR WILLFULLY REFUSES TO COMPLY WITH THEIR LAWFUL DEMANDS, SHALL BE FINED NOT MORE THAN ONE THOUSAND DOLLARS.

SECTION 21. APPROPRIATION. THERE IS HEREBY APPROPRIATED THE SUM OF \$87,000.00 OR SO MUCH THEREOF AS MAY BE NECESSARY FOR THE OPERATION OF THIS ACT.

SECTION 22. EFFECTIVE DATE. THIS ACT SHALL TAKE EFFECT UPON ITS APPROVAL.

## APPENDIX C

THE COMMONWEALTH OF MASSACHUSETTS

---

IN THE YEAR ONE THOUSAND NINE HUNDRED AND SIXTY-NINE

---

AN ACT ESTABLISHING THE MASSACHUSETTS INFORMATION AND REFERRAL  
AGENCY UNDER THE OFFICE OF OMBUDSMAN.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES IN  
GENERAL COURT ASSEMBLED, AND BY THE AUTHORITY OF THE SAME,  
AS FOLLOWS:

CHAPTER 9 OF THE GENERAL LAWS IS HEREBY AMENDED BY IN-  
SERTING AFTER SECTION 27 UNDER THE CAPTION MASSACHUSETTS  
INFORMATION AND REFERRAL AGENCY UNDER THE OFFICE OF OM-  
BUDSMAN THE FOLLOWING ELEVEN SECTIONS: ----

SECTION 28. THE FOLLOWING WORDS AND PHRASES AS USED  
IN SECTIONS TWENTY-EIGHT TO THIRTY-EIGHT INCLUSIVE, UN-  
LESS A DIFFERENT MEANING IS PLAINLY REQUIRED BY THE CON-  
TEXT, SHALL HAVE THE FOLLOWING MEANINGS: - "ADMINISTRAT-  
IVE ACT" INCLUDES ANY ACTION, OMISSION, DECISION, RE-  
COMMENDATION, PRACTISE, OR PROCEDURES, BUT DOES NOT  
INCLUDE THE PREPARATION OR PRESENTATION OF LEGISLATION.  
"AGENCY" INCLUDES ANY DEPARTMENT, BOARD, COMMISSION,  
DIVISION OR AUTHORITY OF THE COMMONWEALTH OR SUBDIVISION  
OF ANY OF THE FOREGOING OR OFFICIAL OF THE COMMONWEALTH  
AUTHORIZED BY LAW TO MAKE REGULATIONS OR TO CONDUCT  
PROCEEDINGS, BUT DOES NOT INCLUDE A COURT; THE LEGISLAT-  
URE, ITS COMMITTEES OR STAFF; OR THE GOVERNOR AND HIS  
PERSONAL STAFF.

SECTION 29. THERE SHALL BE DIRECTLY UNDER THE GENERAL  
COURT, BUT NOT SUBJECT TO ITS CONTROL, A MASSACHUSETTS  
INFORMATION AND REFERRAL AGENCY UNDER THE DIRECTION OF  
THE OFFICE OF OMBUDSMAN. SAID OFFICE SHALL, IN RESPONSE  
TO INQUIRIES OR COMPLAINTS SUBMITTED BY ANY PERSON,  
PROVIDE INFORMATION RELATIVE TO ANY ADMINISTRATIVE ACT  
OR ACTION OF AN AGENCY OR REFER SAID INQUIRY OR COM-  
PLAINT TO AN APPROPRIATE AGENCY OR, ON ITS OWN INITIAT-  
IVE INVESTIGATE ANY ADMINISRATIVE ACT OR REVIEW ANY  
ACTION OF AN AGENCY IF IT REASONABLY BELIEVES THAT SAID  
ACT OR ACTION MAY GIVE RISE TO LEGITIMATE GRIEVANCES;  
PROVIDED, HOWEVER, THAT ITS POWERS SHALL BE ONLY ADVIS-  
ORY AND IT SHALL NOT BE AUTHORIZED TO VETO, ALTER OR  
AMEND ANY ADMINISTRATIVE DECISION. THE OFFICE OF OMBUDS-  
MAN SHALL ESTABLISH A TELEPHONE INFORMATION CENTER AT  
THE ~~SA~~ STATE HOUSE FOR THE USE AND CONVENIENCE OF CITIZENS.  
THE OFFICE OF OMBUDSMAN SHALL MAKE SUCH REPORTS AND

RECOMMENDATIONS TO THE GOVERNOR, ATTORNEY GENERAL, GENERAL COURT, OR ANY OTHER OFFICER, OR AGENCY OF THE COMMONWEALTH AS IT MAY DEEM DESIRABLE ON THE BASIS OF ITS INVESTIGATIONS.

SECTION 30. THE OFFICE OF OMBUDSMAN MAY INVESTIGATE AN ADMINISTRATIVE ACT OR AN ACTION OF AN AGENCY WHICH IN ITS OPINION IS CONTRARY TO LAW; UNREASONABLE, UNFAIR OR UNNECESSARILY DISCRIMINATORY, EVEN THOUGH IN ACCORDANCE WITH LAW; BASED ON A MISTAKE OF FACT; BASED ON IMPROPER OR IRREVELANT GROUNDS; UNACCOMPANIED BY AN ADEQUATE STATEMENT OF PURPOSE; PERFORMED IN AN INEFFICIENT MANNER; OR, OTHERWISE ERRONEOUS.

IF THE OFFICE OF OMBUDSMAN DECIDES TO MAKE SUCH AN INVESTIGATION IT SHALL NOTIFY THE AGENCY INVOLVED OF ITS INTENTION TO INVESTIGATE, AND IF SAID INVESTIGATION IS BASED ON A COMPLAINT, THE COMPLAINANT SHALL BE NOTIFIED OF THE INTENTION TO INVESTIGATE. A COPY OF ANY REPORT FILED BY THE OFFICE SHALL BE SENT TO THE AGENCY INVOLVED AND THE COMPLAINANT.

THE OMBUDSMAN SHALL HAVE ANY SUCH ADDITIONAL POWERS AS GENERALLY PROVIDED FOR AGENCIES CONDUCTING ADJUDICATORY PROCEEDINGS UNDER THIRTY A OF THE GENERAL LAWS.

SECTION 31. THE OFFICE OF OMBUDSMAN MAY REFUSE TO INVESTIGATE ANY COMPLAINT WHICH IS SUBJECT TO INVESTIGATION UNDER THE PROVISIONS OF THE PROCEEDING SECTION IF IT DETERMINES THAT THERE HAS BEEN UNDUE OR UNREASONABLE DELAY IN FILING THE COMPLAINT; THE COMPLAINT IS TRIVIAL OR MADE IN BAD FAITH; THE FACILITIES OF THE OFFICE ARE INSUFFICIENT FOR ADEQUATE INVESTIGATION; OR, THERE ARE OTHER COMPLAINTS MORE WORTHY OF IMMEDIATE ATTENTION.

SAID OFFICE SHALL GIVE NOTICE TO THE COMPLAINT OF ITS DECISION NOT TO INVESTIGATE AND IT MAY STATE ITS REASONS FOR SUCH FAILURE TO INVESTIGATE.

SECTION 32. THE OFFICE OF OMBUDSMAN SHALL KEEP A RECORD OF ALL PUBLIC PUBLICATIONS OF THE COMMONWEALTH; PROVIDE DETAILED INFORMATION OF THE PURPOSES, SCOPE AND PROCEDURES OF ALL MAJOR PROGRAMS OR REFER ANY PERSONS TO THE APPROPRIATE OFFICE WHICH CAN PROVIDE SAID INFORMATION; KEEP A RECORD OF THE EXISTENCE AND PROCEDURES OF ALL BOARDS OF APPEAL AND SIMILAR AGENCIES TO WHOM A PERSON AGGRIEVED MAY APPEAL FOR POSSIBLE REDRESS AND RELIEF.

IF SAID OFFICE REFERS A PERSON TO ANY OTHER AGENCY, IT SHALL LATER CONFIRM WITH SUCH PERSON WHETHER FURTHER ACTION ON ITS PART IS REQUIRED TO SATISFY THE ORIGINAL REQUEST.

ANY INFORMATION REQUIRED TO BE KEPT BY THE OFFICE OF OMBUDSMAN SHALL BE MADE AVAILABLE TO ALL INTERESTED PERSONS UPON REQUEST EXCEPT INFORMATION DEEMED TO BE OF A CONFIDENTIAL NATURE.



SECTION 33. THE OFFICE OF OMBUDSMAN SHALL BE KEPT INFORMED AS TO THE PROGRESS AND FINAL DISPOSITION OF A CASE REFERRED TO ANOTHER AGENCY AND MAY TAKE SUCH FURTHER ACTION WITHIN THE SCOPE OF ITS POWERS AS MAY BE NECESSARY TO EFFECT A SATISFACTORY SOLUTION.

SECTION 34. THE OFFICE OF OMBUDSMAN MAY PUBLISH ITS REPORTS OR RECOMMENDATIONS, OR SUCH PORTIONS OF THEM, AS IT MAY DEEM TO BE IN THE PUBLIC INTEREST; PROVIDED THAT ANY MATERIAL WHICH IS DEEMED TO BE OF CONFIDENTIAL NATURE AND NOT PROPERLY IN THE PUBLIC DOMAIN MAY BE WITHHELD FROM PUBLICATION.

SECTION 35. THERE SHALL BE IN THE OFFICE OF OMBUDSMAN, A CHIEF OFFICER WHO SHALL DEVOTE FULL TIME TO HIS OFFICIAL DUTIES, WHO SHALL BE KNOWN AS THE OMBUDSMAN, AND WHO SHALL BE ELECTED FOR A TERM OF TEN YEARS BY A TWO THIRDS VOTE OF THE SENATORS AND REPRESENTATIVES, MEETING JOINTLY. THE ELECTION WILL BE MADE FROM ONE OR MORE NOMINEES CHOSEN BY A COMMITTEE CONSISTING OF THE SENATE PRESIDENT, THE SPEAKER OF THE HOUSE AND THE MAJORITY LEADERS OF BOTH BRANCHES. AN OMBUDSMAN MAY NOT SERVE MORE THAN ONE TERM AND MAY BE REMOVED OR SUSPENDED FROM OFFICE FOR NEGLIGENCE OF DUTY, MISCONDUCT OR DISABILITY BY A TWO THIRDS VOTE OF THE SENATORS AND REPRESENTATIVES MEETING JOINTLY. NO PERSON MAY SERVE AS OMBUDSMAN WHILE HE IS A CANDIDATE FOR OR HOLDS ANY OTHER STATE OFFICE. IF THE OMBUDSMAN DIES, RESIGNS, BECOMES INELIGIBLE TO SERVE, OR IS REMOVED OR SUSPENDED FROM OFFICE, THE FIRST ASSISTANT TO THE OMBUDSMAN SHALL BECOME THE ACTING OMBUDSMAN UNTIL A NEW OMBUDSMAN IS APPOINTED AND QUALIFIED FOR THE REMAINDER OF THE TERM.

SECTION 36. THE OMBUDSMAN SHALL APPOINT A FIRST ASSISTANT AND SUCH OTHER OFFICES AND EMPLOYEES, AS SHALL BE NECESSARY TO CARRY OUT THE DUTIES OF THE OMBUDSMAN, WHO SHALL NOT BE SUBJECT TO THE PROVISIONS OF CHAPTER THIRTY-ONE.

THE OMBUDSMAN SHALL TAKE AN OATH THAT HE WILL NOT, EXCEPT FOR THE PURPOSE OF CARRYING OUT THE DUTIES OF HIS OFFICE, DIVULGE ANY CONFIDENTIAL INFORMATION RECEIVED BY HIM PROVIDED THAT THE OMBUDSMAN MAY DISCLOSE IN ANY REPORT MADE BY HIM SUCH MATTERS AS IN HIS OPINION SHOULD BE DISCLOSED IN ORDER TO ESTABLISH GROUNDS FOR HIS CONCLUSIONS AND RECOMMENDATIONS. EVERY OFFICIAL UNDER THE OMBUDSMAN SHALL TAKE A SIMILAR OATH.

SECTION 37. INFORMATION RECEIVED BY THE OFFICE OF OMBUDSMAN SHALL BE PRIVILEGED, AND SUCH PRIVILEGE MAY BE WAIVED ONLY BY THE PERSON FURNISHING SUCH INFORMATION TO SAID OFFICE.

SECTION 38. THE OMBUDSMAN SHALL SUBMIT AN ANNUAL REPORT OF HIS ACTIVITIES TO THE GOVERNOR AND THE GENERAL COURT.

## APPENDIX D

CRITERIA FOR ESTABLISHMENT OF AN EFFECTIVE  
GRIEVANCE MECHANISM\*

INDEPENDENCE: THIS CAN BE ACHIEVED BY LONG TERM APPOINTMENT OF THE ADMINISTRATOR, SUBJECT TO CITY COUNCIL REMOVAL. THE GRIEVANCE AGENCY SHOULD BE SEPARATE FROM OPERATING MUNICIPAL AGENCIES.

ADEQUATE STAFF AND FUNDING: EXACT COSTS WILL VARY DEPENDING ON THE SIZE AND NEEDS OF THE CITY'S POPULATION. IT IS MOST IMPORTANT THAT THE AGENCY HAVE ADEQUATE FUNDS AND STAFF TO DISCHARGE ITS RESPONSIBILITIES.

COMPREHENSIVE COVERAGE OF GRIEVANCES AGAINST PUBLIC AGENCIES AND AUTHORITIES: GENERAL JURISDICTION WILL FACILITATE ACCESS BY GRIEVANTS. MOREOVER, UNLIKE SPECIALIZED, COMPLAINT AGENCIES, SUCH AS CIVILIAN REVIEW BOARDS, ALL AGENCIES WOULD BE BROUGHT EQUALLY UNDER PUBLIC SCRUTINY. THIS SHOULD FACILITATE ITS ACCEPTANCE BY PUBLIC OFFICIALS.

POWER TO RECEIVE COMPLAINTS, HOLD HEARINGS, SUBPOENA WITNESSES, MAKE PUBLIC RECOMMENDATIONS FOR REMEDIAL ACTION TO LOCAL AUTHORITIES AND, IN CASES INVOLVING VIOLATION OF LAW, BRING SUIT. THESE POWERS ARE THE MINIMUM NECESSARY TO THE EFFECTIVE OPERATION OF THE GRIEVANCE MECHANISM. AS WE ENVISION IT, THE AGENCY'S PRINCIPAL POWER DERIVES FROM ITS AUTHORITY TO INVESTIGATE AND MAKE PUBLIC FINDINGS AND RECOMMENDATIONS. IT SHOULD, OF COURSE, HAVE A CONCILIATION PROCESS WHEREBY COMPLAINTS COULD BE RESOLVED WITHOUT FULL INVESTIGATION AND PROCESSING.

ACCESSIBILITY: IN LARGE CITIES, ACCESS MAY REQUIRE SETTING UP NEIGHBORHOOD OFFICES IN GHETTO AREAS. IN OTHERS, LOCAL RESIDENT AIDES COULD BE EMPOWERED TO RECEIVE COMPLAINTS. IT SHOULD BE POSSIBLE TO FILE A GRIEVANCE ORALLY OR IN WRITING. IF FORMS ARE USED, THEY SHOULD BE EASILY UNDERSTOOD AND WIDELY AVAILABLE.

PARTICIPATION IN GRIEVANCE PROCESS: GRIEVANTS SHOULD BE GIVEN FULL OPPORTUNITY TO TAKE PART IN ALL PROCEEDINGS AND TO BE REPRESENTED BY COUNSEL. THEY SHOULD RECEIVE PROMPT ADVICE OF ACTION TAKEN, AND RESULTS OF INVESTIGATIONS SHOULD BE MADE PUBLIC.

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\* TAKEN FROM REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (NEW YORK, 1968), P. 292.



## APPENDIX E

NATURE OF COMPLAINTS SUBMITTED TO BUFFALO EVENING NEWS

ACTION LINE COLUMN (JANUARY 16, 1967 TO JULY 15, 1967)\*

SUBJECT MATTER	REQUESTS FOR INFORMATION		COMPLAINTS	
	TYPES	NUMBER	TYPES	NUMBER
FEDERAL GOVERNMENT	26	95	11	34
STATE GOVERNMENT	33	91	24	63
LOCAL GOVERNMENT	32	108	40	313
TOTAL GOVERNMENT	<u>91</u>	<u>294</u>	<u>75</u>	<u>410</u>
NON-GOVERNMENTAL	80	269	25	95
	<u>171</u>	<u>563</u>	<u>100</u>	<u>505</u>

SUBJECT MATTER	NUMBER OF COMPLAINTS
1. ROAD REPAIRS AND STREET MAINTENANCE	43
2. VACANT BUILDING AND LAND	33
3. TRAFFIC CONTROL	32
4. TREES	22
5. PARKS AND RECREATION	20
6. VEHICLE PARKING	16
7. SIDEWALKS	16
8. WELFARE	15
9. LITTERING	10
10. PUBLIC UTILITIES—WATER AND SEWAGE	10
11. EDUCATION	9
12. HOSPITALS AND HOMES	9
13. PUBLIC BUILDINGS	8
14. ANIMALS	7
15. CIVIL SERVICE	6
16. PLANNING AND ZONING	5
17. POLICE ADMINISTRATION	5
18. BUILDING VIOLATIONS	5
19. MISCELLANEOUS (LESS THAN 5 COMPLAINTS)	42
TOTAL	<u>313</u>

\* TAKEN FROM WILLIAM H. ANGUS AND MILTON KAPLAN, "THE OMBUDSMAN AND LOCAL GOVERNMENT," IN STANLEY V. ANDERSON, OMBUDSMAN FOR AMERICAN GOVERNMENT? (ENGLEWOOD CLIFFS, NEW JERSEY, 1968), PP. 124-125



APPENDIX F

OMBUDSMAN QUESTIONNAIRE

1. SHOULD THE OMBUDSMAN COVER:

- A. ONLY STATE AGENCIES \_\_\_\_\_
- B. STATE AND LOCAL AGENICES \_\_\_\_\_
- C. STATE AND FEDERAL AGENCIES \_\_\_\_\_
- D. STATE, FEDERAL, AND LOCAL AGENCIES \_\_\_\_\_

2. SHOULD THE OMBUDSMAN EXCLUDE:

- |                                      | Yes | No |
|--------------------------------------|-----|----|
| A. THE COURTS                        |     |    |
| (1) FEDERAL                          |     |    |
| (2) STATE                            |     |    |
| (3) LOCAL                            |     |    |
| B. LEGISLATURES OR THEIR STAFFS      |     |    |
| (1) FEDERAL                          |     |    |
| (2) STATE                            |     |    |
| (3) LOCAL                            |     |    |
| C. POLICE                            |     |    |
| D. FIRE                              |     |    |
| E. ACTIVITIES OF THE CHIEF EXECUTIVE |     |    |
| F. PRISONS                           |     |    |
| G. OTHERS (EXPLAIN BELOW)            |     |    |

3. SHOULD THE OMBUDSMAN BE:

- A. INDEPENDENT, APPOINTED BY THE LEGISLATURE\* \_\_\_\_\_
- B. INDEPENDENT, APPOINTED BY THE EXECUTIVE\* \_\_\_\_\_
- C. INDEPENDENT, APPOINTED BY A SPECIAL COMMITTEE\* \_\_\_\_\_
- D. AN OFFICER OF THE LEGISLATURE RESPONSIBLE TO  
    A PARTICULAR COMMITTEE OR THE LEGISLATIVE  
    LEADERSHIP (REMOVABLE AT WILL)\* \_\_\_\_\_
- E. AN OFFICER OF THE EXECUTIVE BRANCH \_\_\_\_\_
- F. A CONSTITUTIONAL OFFICER ELECTED BY POPULAR  
    VOTE \_\_\_\_\_
- G. OTHER (EXPLAIN BELOW) \_\_\_\_\_

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\* SEE QUESTION 4.

## 4. METHODS OF APPOINTMENT:

- A. BY THE EXECUTIVE, CONFIRMED BY THE LEGISLATURE \_\_\_\_\_
- B. BY THE EXECUTIVE FROM A LIST SUBMITTED BY THE  
LEGISLATURE \_\_\_\_\_
- C. BY THE EXECUTIVE FROM NOMINATIONS MADE BY A  
SPECIAL SELECTION COMMITTEE \_\_\_\_\_
- D. BY THE LEGISLATURE \_\_\_\_\_
- E. BY THE LEGISLATURE, EXECUTIVE POWER OF VETO \_\_\_\_\_
- F. BY THE LEGISLATURE, FROM NOMINATIONS SUBMITTED  
BY A SELECTION COMMITTEE \_\_\_\_\_
- G. BY AN EXTERNAL SELECTION COMMITTEE \_\_\_\_\_
- H. BY THE LEADERSHIP OF THE LEGISLATURE, CONFIRMED  
BY THAT BODY \_\_\_\_\_
- I. OTHER (EXPLAIN BELOW) \_\_\_\_\_

THE FOLLOWING IS A LIST OF SECONDARY ISSUES WHICH WE SHOULD CONSIDER IN THE CONSTRUCTION OF AN OMBUDSMAN STATUTE. ALTERNATIVES ARE PROVIDED IN CERTAIN INSTANCES. IT IS OUR GENERAL INTENTION THAT EACH CONSULTANT EITHER INDICATE HIS APPROVAL OR MAKE SPECIFIC COMMENTS ON THE ITEM.

5. QUALIFICATIONS:

THE OMBUDSMAN MIGHT BE REQUIRED TO HAVE A LEGAL BACKGROUND, BUT I DOUBT OF THIS IS NECESSARY.

STAFF COMMENT:

## 6. TERM OF OFFICE AND REMOVAL:

THE TERM SHOULD BE LONG, BUT NOT INDEFINITE. THE OMBUDSMAN SHOULD BE INSULATED FROM POLITICAL CONSIDERATIONS, BUT NOT ISOLATED FROM LEGISLATIVE CONTROL.

I RECOMMEND A FIVE-YEAR TERM WITH THE FIRST APPOINTMENT TO TAKE PLACE IN JUNE. A TERM BEGINNING OR ENDING IN OR NEAR THE MONTH OF NOVEMBER MAY MAKE THE OFFICE A POLITICAL ISSUE WHEN IT SHOULD NOT BE. A FIVE-YEAR TERM WOULD ALLOW FOR A PERIOD OF OVERLAP BETWEEN GOVERNORS.

A PROVISION ALLOWING FOR THE REMOVAL OF THE OMBUDSMAN BY A TWO-THIRDS VOTE OF THE SENATE SEEMS TO PROVIDE AN ADEQUATE LEGISLATIVE CHECK AGAINST THE OFFICE.

STAFF COMMENT:



## 7. TITLE OF THE OFFICE:

- A. OMBUDSMAN
- B. PUBLIC PROTECTOR
- C. OTHER \_\_\_\_\_

## 8. SALARY OF THE OMBUDSMAN

- A. AMOUNT PREFERRED \_\_\_\_\_
- B. SAME AS CHIEF JUDGE OF THE HIGHEST COURT OF THE STATE (YES/NO)
- C. SAME AS THE "SECRETARY" OF THE HIGHEST PAID CABINET OFFICE (YES/NO)

## 9. SELECTION OF PERSONNEL--ORGANIZATION OF THE OFFICE

## A. SELECTION

- (1) SELECTED FROM CIVIL SERVICE LISTS \_\_\_\_\_
- (2) SELECTION AS THE OMBUDSMAN SEES FIT, REMOVABLE ONLY UNDER CIVIL SERVICE REGULATIONS \_\_\_\_\_
- (3) SELECTION AND REMOVAL AS THE OMBUDSMAN SEES FIT \_\_\_\_\_

- B. DEPUTY DIRECTOR: SHOULD IT BE REQUIRED THAT A DEPUTY DIRECTOR BE APPOINTED TO ACT IN THE OMBUDSMAN'S STEAD SHOULD HE BE ILL OR ABSENT FROM THE STATE \_\_\_\_\_

## C. NUMBER OF POSITIONS AND SALARY

- (1) THE OMBUDSMAN WOULD BE FREE TO SET THE NUMBER OF POSITIONS AND THEIR SALARY WITHIN A GIVEN APPROPRIATION \_\_\_\_\_
- (2) THE OMBUDSMAN MUST USE NORMAL STATE PROCEDURES AND RATES. THE APPROPRIATION MAY SPECIFY THE NUMBER AND SALARY OF STAFF POSITIONS.

## D. THE OMBUDSMAN SHOULD MAINTAIN OFFICES

- (1) IN EACH CITY AND TOWN
- (2) IN EACH PLANNING REGION
- (3) AS HE DESIRES

COMMENTS:

## 10. APPROPRIATIONS:

YES NO

WE MIGHT MAKE A PROVISION WHICH WOULD PREVENT THE OMBUDSMAN'S APPROPRIATION FROM BEING LESS THAN THREE TIMES THE SALARY OF HIS OFFICE FIXED IN SECTION 4B OR MAKE NO PROVISION AT ALL AND ALLOW FOR NORMAL APPROPRIATION PROCEDURES.

COMMENT:

## 11. POWERS:

## A. MAJOR FUNCTIONS

- (1) POWER TO INVESTIGATE ADMINISTRATIVE PRACTICES OR PROCEDURES ON HIS OWN INITIATIVE
- (2) POWER TO INVESTIGATE ONLY COMPLAINTS FORWARDED BY THE LEGISLATURE
- (3) POWER TO INVESTIGATE COMPLAINTS TENDERED BY ANY CITIZEN
- (4) MUST ACT ON EVERY COMPLAINT SUBMITTED

## B. SHALL THE OMBUDSMAN HAVE POWER TO

- (1) SUBPOENA PAPERS
- (2) SUBPOENA WITNESSES
- (3) HOLD HEARINGS

## C. COMPLAINTS TO THE OFFICE

- (1) MUST BE WRITTEN
- (2) MAY BE IN ANY FORM
- (3) SHALL BE IN A FORM PRESCRIBED BY THE OMBUDSMAN

## D. THE OMBUDSMAN

- (1) MAY EXAMINE ALL THE RECORDS AND DOCUMENTS OF AN AGENCY
- (2) MAY ENTER AND INSPECT PREMISES WITHIN ANY ADMINISTRATIVE AGENCY'S CONTROL
- (3) MAY PARTICIPATE OR CONDUCT A GENERAL OR SPECIFIC STUDY OF ANY AGENCY OR ADMINISTRATIVE PRACTICE OR PROCEDURE

COMMENT:

12. SHOULD THE OMBUDSMAN

YES NO

- A. HAVE A SPECIFIC "STATUTE OF LIMITATIONS" OR TIME PERIOD BEYOND WHICH HE CANNOT ACT ON COMPLAINTS
- B. HAVE THE POWER TO REFUSE COMPLAINTS WHICH HAVE BEEN TOO LONG DELAYED IN PRESENTATION

COMMENT:

13. SHOULD THE OMBUDSMAN BE REQUIRED TO

- A. NOTIFY THE COMPLAINANT AND, WHEN SUITABLE THE AGENCY OR AGENCIES INVOLVED WHEN HE REFUSES TO CONSIDER A COMPLAINT AND STATE HIS REASONS FOR DOING SO
- B. CONSULT WITH THE APPROPRIATE AGENCY BEFORE ANNOUNCING A CONCLUSION OR RECOMMENDATION WHICH CRITICIZES THAT AGENCY

COMMENT:

14. SHOULD THE STATUTE REQUIRE THAT LETTERS FROM PERSONS IN AN INSTITUTION UNDER THE CONTROL OF AN ADMINISTRATIVE AGENCY BE FORWARDED UNOPENED TO THE OMBUDSMAN.

COMMENT:

15. PUBLICATION:

- A. THE OMBUDSMAN SHOULD BE REQUIRED TO INCLUDE AN AGENCY DEFENSE OR STATEMENT OF JUSTIFICATION PROVIDED BY THE AGENCY IN ANY REPORT HE MAKES TO THE CHIEF EXECUTIVE OR THE LEGISLATURE
- B. THE OMBUDSMAN SHOULD NOT BE ALLOWED TO CRITICIZE ANY INDIVIDUAL BY NAME WHO HAS PERMANENT, TEMPORARY, OR PROVISIONAL CIVIL SERVICE STATUS.
- C. ONLY THE OMBUDSMAN OR HIS DEPUTY SHALL BE PERMITTED TO RELEASE A COMPLAINT, GRIEVANCE, REPORT ON A COMPLAINT, OR ACTION OR INACTION TAKEN TO THE PRESS OR MEMBER OF THE LEGISLATIVE OR EXECUTIVE DEPARTMENT.

COMMENT:

16. IMMUNITIES:

YES | NO

- A. NO PROCEEDING OPINION OR EXPRESSION BY THE OMBUDSMAN SHALL BE REVIEWABLE IN ANY COURT.
- B. NO CIVIL ACTION SHALL LIE AGAINST THE OMBUDSMAN OR ANY MEMBER OF HIS STAFF FOR ANYTHING DONE, SAID, OR OMITTED IN DISCHARGING HIS STATUTORY RESPONSIBILITIES.
- C. NEITHER THE OMBUDSMAN NOR ANY MEMBER OF HIS STAFF SHALL BE REQUIRED TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING CONCERNING MATTERS WITHIN HIS OFFICIAL COGNIZANCE, EXCEPT IN A PROCEEDING TO ENFORCE THIS ACT.

COMMENT:

17. OBSTRUCTION:

ANY PERSON WILLFULLY OBSTRUCTING THE OMBUDSMAN IN THE PROPER EXERCISE OF HIS DUTIES OR WHO MISLEADS OR ATTEMPTS TO MISLEAD THE OMBUDSMAN IN HIS INQUIRIES SHALL BE FINED NOT MORE THAN \$1,000.

COMMENT:

18. QUALIFICATIONS:

IT HAS BEEN SUGGESTED THAT THE APPOINTMENT OF AN INDIVIDUAL WITHIN TWO YEARS OF HIS HAVING HELD ELECTIVE PUBLIC OFFICE (OTHER THAN JUDICIAL) OR WITHIN TWO YEARS OF HIS HAVING HELD AN OFFICIAL POSITION WITH ANY POLITICAL PARTY WOULD HELP INSURE THE SELECTION OF THE OMBUDSMAN ON PROFESSIONAL AND NOT POLITICAL GROUNDS.

COMMENT:

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